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No. 15-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. Here, a jury acquitted petitioners of conspiring and traveling to violate 18 U.S.C. § 666, but convicted petitioners of violating § 666. The convictions were vacated on appeal because they rested on incorrect jury instructions, and it is undisputed that the acquittals depended on the jury's finding that petitioners did not violate § 666. The government nonetheless sought to retry petitioners on the § 666 charges.

Widening an acknowledged split, the First Circuit held that the acquittals have no preclusive effect under *Ashe* because they were inconsistent with the vacated, unlawful convictions. The First Circuit distinguished *Yeager v. United States*, 557 U.S. 110 (2009), which held that an acquittal retains its preclusive effect even when it is inconsistent with a hung count, on the theory that juries "speak" through vacated convictions, but not through hung counts. The questions presented are:

1. Whether, under *Ashe* and *Yeager*, a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.

2. Whether, under *Evans v. Michigan*, 133 S. Ct. 1069 (2013), the Double Jeopardy Clause permits a district court to retract its "judgment of acquittal" entered on remand as an interpretation of the Court of Appeals mandate.

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JURISDICTION

The First Circuit issued its decision on June 15, 2015. Pet. App. 1a. Petitioners filed a timely petition for rehearing en banc, which the court denied on July 27, 2015. *Id.* at 134a-135a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

STATEMENT

This case is an ideal vehicle to resolve a deep and acknowledged conflict on a recurring question of national importance concerning the Fifth Amendment's Double Jeopardy Clause. Widening a 5-3 split, the First Circuit held that an unlawful, vacated conviction nullifies the bar against a criminal defendant being twice put in jeopardy for the same offense. That holding turns on the interplay between three of this Court's decisions.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the collateral estoppel aspect of the Double Jeopardy Clause bars a new prosecution that depends on a fact necessarily decided in the defendant's favor by an earlier acquittal. In *United States v. Powell*, 469 U.S. 57 (1984), the Court held that, in a single trial,

the jury's acquittal on one count does not invalidate the jury's valid conviction on another count, even if the conviction is logically inconsistent with the acquittal. And in *Yeager v. United States*, 557 U.S. 110 (2009), the Court held that when a jury acquits on one count and hangs on another, the acquittal retains preclusive effect under *Ashe* and prevents retrial of the hung count—even if the acquittal was logically inconsistent with the hung count. The question here is whether, for purposes of *Ashe*'s collateral estoppel analysis, a vacated conviction that is logically inconsistent with an accompanying acquittal is more like the valid conviction in *Powell* or the hung count in *Yeager*.

Federal courts of appeals and the States' highest courts are hopelessly divided on this question. The question is significant and recurring because prosecutors routinely pile on charges upon charges, either to obtain leverage against defendants or to increase the chances the jury will convict at least on something. The more charges, however, the more likely the trial will result in split, inconsistent verdicts and reversible trial errors. This case well illustrates the point.

The United States brought multiple bribery-related charges against petitioners Juan Bravo-Fernandez and Hector Martínez-Maldonado arising out of a single weekend trip to Las Vegas, worth perhaps a couple thousand dollars at most. The jury acquitted petitioners of conspiring and traveling to violate 18 U.S.C. § 666, which prohibits federal program bribery, but illogically convicted them of the predicate § 666 offense. The First Circuit vacated the § 666 convictions because they rested on improper jury instructions that allowed for conviction on a gratuity theory, even though the statute prohibits only bribes. *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).

The prosecutors sought to retry petitioners under § 666, even though petitioners already had served significant terms of imprisonment under the now-vacated convictions. Petitioners sought to bar re-prosecution, arguing that, under *Ashe* and *Yeager*, the acquittals for conspiracy and traveling depended on a finding that petitioners did not violate § 666, and the acquittals thus barred the government from re-prosecuting petitioners for violating § 666. Petitioners argued that *Powell* was irrelevant because it concerned valid convictions, not vacated convictions.

The First Circuit nonetheless extended *Powell* and held that petitioners' vacated, unconstitutional convictions deprived the acquittals of their otherwise preclusive effect and thus deprived petitioners of the protections of the Double Jeopardy Clause.

The decision below squarely conflicts with decisions of the Michigan, New Mexico, and Iowa Supreme Courts. It is irreconcilable with both *Yeager* and the hornbook rule that a vacated conviction is a legal nullity, ineffective for any purpose. And by eliminating the consequences that otherwise would flow from split verdicts, the First Circuit's decision creates perverse incentives for prosecutors both to bring duplicative charges and to advocate overreaching interpretations of criminal statutes. This Court's review is needed to resolve the conflict and correct the First Circuit's erroneous decision.

Certiorari is independently warranted to review the First Circuit's refusal to give preclusive effect to a judgment of acquittal the district court entered after receiving the court of appeals' mandate in the earlier appeal. The court below permitted the district court to retract that acquittal, adopting the precise test that this Court rejected in *Evans v. Michigan*, 133 S. Ct. 1069 (2013).

A. The Jury Issues a Split Verdict

On June 22, 2010, a federal grand jury indicted petitioners Bravo, the president of a private security firm in Puerto Rico, and Martínez, then a member of the Puerto Rico senate, on a series of bribery-related charges in connection with their trip to a Las Vegas boxing match in May 2005. The government alleged that Bravo paid some of Martínez's expenses for the trip—totaling perhaps a couple thousand dollars—in connection with Martínez's support of two senate bills related to the security industry in Puerto Rico. Pet. App. 3a, 61a-63a. The senate later overwhelming passed the bills by votes of 26-1 and 24-1. COA Joint App. 246, 250. The government nonetheless charged petitioners with a panoply of federal crimes: (1) committing federal program bribery, in violation of 18 U.S.C. § 666; (2) conspiring (a) to violate § 666 and (b) to travel in interstate commerce in aid of racketeering, in violation of 18 U.S.C. § 371; and (3) traveling in interstate commerce to further violations of (a) § 666 and (b) Puerto Rico bribery statutes, in violation of 18 U.S.C. § 1952(a)(3)(A). Pet. App. 3a-4a, 63a.

At the government's urging and over petitioners' objection, the court instructed the jury that § 666 criminalizes not only quid pro quo bribery, but also mere gratuities. *Id.* at 89a. The government's closing argument thus encouraged the jury to convict on the theory that Bravo paid Martínez a gratuity in violation of § 666. *Id.*

On March 7, 2011, after the three-week trial, the jury acquitted Bravo and Martínez of conspiring to violate § 666, and of traveling in interstate commerce to further a violation of § 666. But the jury convicted both petitioners of violating § 666. The jury also convicted Bravo of conspiring to travel in furtherance of "unspecified 'racketeering' activity," and traveling in furtherance of a violation of Puerto Rico bribery statutes, but acquitted Martínez of those offenses. *Id.* at 4a, 64a.

The district court granted Bravo's motion for judgment of acquittal on the charge of traveling to further a violation of Puerto Rico bribery statutes, because Puerto Rico repealed the statutes at issue before the petitioners went to Las Vegas. *Id.* at 110a-111a. The court explained that "Bravo cannot be convicted of conduct that was effectively not a crime at the time the offense took place." *Id.* at 111a (quoting district court).

The district court sentenced both petitioners to 48 months of imprisonment, and imposed a fine of $175,000 on Bravo and $17,500 on Martínez. *Id.* at 64a. The court denied petitioners' motions for bail pending appeal. Martínez began serving his sentence on March 1, 2012, and Bravo began serving his sentence on May 7, 2012. *Id.* at 64a n.4.

B. The First Circuit Reverses or Vacates All Convictions

In 2013, a panel of the First Circuit reversed or vacated each remaining conviction. Pet. App. 4a, 60a. First, the court reversed Bravo's conviction for conspiring to travel to further "unspecified 'racketeering'

activity," because the court found that the only potential predicates for this charge were invalid. *Id.* at 4a, 108a-120a.

Second, and key here, the court vacated Bravo and Martínez's convictions for violating § 666, because they resulted from unlawful jury instructions. *Id.* at 5a, 81a-105a. The court held that § 666 criminalizes only quid pro quo "bribes," not mere "gratuities." *Id.* at 102a-103a. The district court's instructions, however, "improperly invited the jury to convict both Martínez and Bravo for conduct involving gratuities rather than bribes." *Id.* at 104a. Likewise, "the government's closing argument improperly invited the jury to convict the [petitioners] on the proscribed 'gratuity theory,' and the evidence presented at trial could support a finding that the 'payment' Bravo gave and Martínez received constituted a gratuity." *Id.* The § 666 convictions thus "violate[d] due process." *Id.* at 105a (quoting *Fiore v. White*, 531 U.S. 225, 228 (2001)).

After oral argument but before issuing a decision, the First Circuit ordered the petitioners' release on bail. But in the meantime, Bravo served 8 months in prison and Martínez served 10 months in prison on the basis of the unlawful convictions. *Id.* at 64a n.4.

C. The District Court Issues and then Retracts a Judgment of Acquittal on All Counts

On October 25, 2013, two days after the First Circuit's mandate issued, the district court entered a line order granting Bravo and Martínez a "judgement of acquittal" on all counts, including "both [petitioners'] section 666 convictions." Pet. App. 5a-6a. Hours later, the government moved "to clarify" the court's judgment, stating that the First Circuit had

only vacated the § 666 convictions, not reversed them, and that the government planned to retry the petitioners on the standalone § 666 counts. *Id.* at 6a. That same day, the court "vacated" its line order, *id.*, on the ground that the "order of acquittal" was "contrary to the Court of Appeals' mandate." *Id.* at 55a. The district court simultaneously issued a new order vacating the § 666 convictions. *Id.* Petitioners moved to reinstate the acquittals, arguing that the Double Jeopardy Clause barred the district court from retracting them. The court denied the motion. *Id.* at 54a-58a.

D. The Decision Below

Bravo and Martínez thereafter moved to preclude retrial of the § 666 charges under the Double Jeopardy Clause. They argued that *Ashe*'s and *Yeager*'s collateral estoppel analysis barred retrial on those charges, because the jury necessarily found that Bravo and Martínez did not violate § 666 in acquitting them of conspiring and traveling to violate § 666. The court denied the motions. Pet. App. 41a-53a.

A panel of the First Circuit affirmed. It was undisputed, the court acknowledged, that the jury's acquittals on conspiring to violate § 666 and traveling to violate § 666 necessarily depended on a finding that neither defendant violated § 666. *Id.* at 12a-15a & n.5. In other words, "a rational jury could [not] have grounded its verdict upon an[y] [other] issue." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Under an ordinary double jeopardy analysis, therefore, the Fifth Amendment would prohibit the government from re-prosecuting petitioners on the standalone § 666 charges. *See id.* at 444-46.

But the court of appeals held that the Double Jeopardy Clause did not apply. The court reasoned that the § 666 convictions—which were vacated because they were obtained unlawfully, in violation of the Due Process Clause—divested petitioners of their double jeopardy rights. Pet. App. 15a-20a. The vacated convictions, the court believed, were "part of what the jury decided at trial" and factored into the double jeopardy analysis. *Id.* at 18a-20a. Relying on *Powell*, the court thus concluded that an acquittal has no preclusive effect if the acquittal was logically inconsistent with a vacated conviction. *Id.*

The First Circuit then turned to *Yeager*'s holding that an acquittal retains its preclusive effect even if the acquittal is logically inconsistent with a hung count. *Id.* at 17a-18a. Because "a jury speaks only through its verdict," and not through hung counts, *Yeager* held, hung counts do not bear on what the jury necessarily decided in an *Ashe* analysis. *Id.* at 18a (quoting *Yeager*, 557 U.S. at 121-22). But the court of appeals concluded that vacated convictions are "meaningfully different" from hung counts, *id.* at 17a, because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Id.* at 18a. Because the court found the acquittals here logically inconsistent with the vacated convictions, the court refused to accord the acquittals preclusive effect. *Id.* at 20a-33a.

The First Circuit acknowledged that "a divided Michigan Supreme Court recently came to the opposite judgment," holding that vacated convictions, like hung counts under *Yeager*, are irrelevant to the collateral estoppel inquiry. *Id.* at 19a-20a (citing *People v. Wilson*, 852 N.W.2d 134 (Mich. 2014)). But the court of appeals found the dissent in the Michigan

case "more persuasive," and accordingly joined two other circuits and two state high courts that likewise hold that a vacated conviction can negate the preclusive effect of an acquittal. *Id.* at 19a-20a & nn.7-8.

The First Circuit then rejected petitioners' separate double jeopardy argument—that the district court's October 25, 2013 judgment of acquittal on all counts barred retrial on the § 666 counts. *Id.* at 37a-39a. The court below acknowledged the "well-established rule that 'the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation.'" *Id.* at 37a (quoting *Evans*, 133 S. Ct. 1074). But the court below permitted the district court to retract its acquittal here on the theory that the acquittal did not resolve any "factual element[] of the offense charged." *Id.* at 37a-38a (quotation marks omitted).

On July 27, 2015, the First Circuit denied rehearing. *Id.* at 134a-135a. Over the government's objection, the court stayed its mandate pending this Court's resolution of this petition. *Id.* at 136a-137a.

REASONS FOR GRANTING THE PETITION

I. The First Circuit Deepened an Acknowledged Split About the Collateral Estoppel Aspect of the Double Jeopardy Clause

This case presents an ideal opportunity for the Court to resolve a 5-3 split over whether a vacated, unconstitutional conviction can eliminate the preclusive effect of an acquittal under the Double Jeopardy Clause. The First Circuit's decision answering that question in the affirmative is also at odds with this Court's decision in *Yeager* and with the blackletter principle that vacated convictions are legal nullities

with no effect, in any context. The question is squarely presented, outcome determinative in this years-long prosecution, and of enormous significance to federal and state criminal defendants.

A. The Decision Below Conflicts With Decisions of the Supreme Courts of Michigan, New Mexico, and Iowa

1. The First Circuit acknowledged that its decision is directly contrary to the Michigan Supreme Court's decision in *People v. Wilson*, 852 N.W.2d 134 (Mich. 2014). Pet. App. 19a-20a. There, the jury convicted the defendant of felony murder but acquitted him of home invasion, which was the only predicate felony that could support the felony murder conviction. 852 N.W.2d at 136-37. The felony murder conviction was then vacated on appeal for unrelated reasons, and the court held that the acquittal for home invasion collaterally estopped the government from retrying the defendant for felony murder. *Id.* at 139-42.

Wilson held that this Court's decision in *Powell* was not implicated because *Powell* addresses the inconsistency within a single, valid verdict, not "the doctrine of collateral estoppel." *Id.* at 139-40. "It is instead the *Yeager* holding that demonstrates why the prosecution cannot re-try the defendant for felony murder," namely, that re-prosecuting the defendant for "felony murder would [] require the same factual basis as home invasion, for which he was previously and finally acquitted." *Id.* at 140. "The inconsistency in the defendant's initial jury verdict," *Wilson* continued, "does not alter this fundamental principle, given the subsequent appellate reversal of his convictions." *Id.* "[T]he defendant no longer stands convicted, not of anything, not at all." *Id.* "*Yeager* thus

controls: [t]he defendant's reversed felony-murder conviction here must be treated exactly as the hung counts were treated in *Yeager*." *Id.* at 141.

2. The court of appeals' decision below also conflicts with decisions of two other State high courts. Like the Michigan Supreme Court, the New Mexico and Iowa Supreme Courts have held that an acquittal precludes retrial of a vacated conviction, if the acquittal necessarily determined a fact that is an element of the vacated conviction.

In *State v. Montoya*, 306 P.3d 426 (N.M. 2013), the jury acquitted the defendant of second-degree murder, *id.* at 432, but convicted him of felony murder, *id.* at 429. The felony murder conviction was vacated on appeal based on unlawful jury instructions, *id.* at 429-31, and the New Mexico Supreme Court held that the collateral estoppel aspect of the federal Double Jeopardy Clause prohibited retrial, *id.* at 431-32. Under New Mexico law, the court explained, second-degree murder is a lesser-included offense of felony murder. *Id.* Thus, the defendant, "having been acquitted of second-degree murder, is constitutionally protected from further prosecution for that offense," including "as a component of felony murder." *Id.* at 432 (citing *Ashe*, 397 U.S. at 446). And that was so even though the acquittal was by definition inconsistent with the initial, vacated conviction for felony murder. The acquittal retained its preclusive effect.

Similarly, in *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), the jury convicted the defendant of assault while participating in a felony but acquitted him of first degree theft, the only potential predicate felony. *Id.* at 807. The Iowa Supreme Court vacated the conviction for assault while participating in a

felony on a state law ground.[1] *Id.* at 815-16. The Court then concluded that the collateral estoppel aspect of the federal Double Jeopardy Clause prohibited retrial of that charge. *Id.* at 816 (citing *Ashe*, 397 U.S. at 442-46). "Here, it is clear that the jury has acquitted the defendant of the underlying predicate offenses. We find that collateral estoppel bars any subsequent retrial on the compound felony charge because the factual issues of guilt on the predicate felonies have been authoritatively determined." *Id.* In short, in Iowa, the fact that acquittals conflict with vacated convictions does not deprive them of their preclusive effect.[2]

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[1] The court vacated the conviction because it concluded that, under Iowa law, inconsistent verdicts rendered in the same trial "undermine[] "our confidence in the outcome of the trial." *Id.* at 815. In that respect, the court diverged from this Court's decision in *Powell*. But the decision to vacate under state law did not affect the court's analysis of the separate question presented in this case: whether the vacated conviction could be retried under the federal collateral estoppel principles in *Ashe*. Other state courts that diverge from *Powell* and vacate inconsistent convictions under state law have held that the vacated conviction *does* deprive the acquittal of preclusive effect. *E.g.*, *DeSacia v. State*, 469 P.2d 369, 379-81 (Alaska 1970).

[2] In addition to the cases from Michigan, New Mexico, and Iowa, the California Supreme Court assumed without deciding that an acquittal could bar a retrial on a vacated count, but held that the acquittal did not necessarily determine any issue essential to a conviction on the vacated count. *People v. Santamaria*, 884 P.2d 81, 87-91 (Cal. 1994). The Delaware Supreme Court, applying Delaware law, held that an acquittal for conspiracy precluded a retrial of a vacated conviction for first degree murder on an accomplice theory, because the acquittal necessarily determined that the defendant was not an accomplice. *Banther v. State*, 884 A.2d 487, 495 (Del. 2005).

3. Departing from the Michigan, New Mexico, and Iowa decisions, the First Circuit below instead joined two other circuits and two other state high courts that hold that vacated convictions can divest defendants of the protections of the Double Jeopardy Clause. Pet. App. 19a (citing *United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985); *State v. Kelly*, 992 A.2d 776, 789 (N.J. 2010); *Evans v. United States*, 987 A.2d 1138, 1141-42 (D.C. 2010)).

Like the First Circuit, the New Jersey and D.C. high courts expressly extended *Powell* and rejected the application of *Yeager* adopted by the Michigan Supreme Court. *Kelly*, 992 A.2d at 785-86, 789; *Evans*, 987 A.2d at 1141-43. The Second and Fifth Circuit decisions pre-date *Yeager*. But as the First Circuit explained, by the time of the Second and Fifth Circuit decisions, both courts had already adopted the rule of *Yeager*, that hung counts are irrelevant to the *Ashe* analysis. Pet. App. 19a n.7. And the Second Circuit has continued to follow *Citron* after *Yeager*. *Id.* (citing *United States v. Bruno*, 531 F. App'x 47, 49 (2d Cir. 2013) (unpub.)).[3]

This Court should grant review to resolve the acknowledged conflict.

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[3] Beyond the cases the First Circuit cited for its side of split, the Alaska Supreme Court also has held that an inconsistent vacated conviction deprives an acquittal of its preclusive effect, at least where the conviction was vacated under state law because of the inconsistency. *DeSacia v. State*, 469 P.2d 369, 380-81 (Alaska 1970). But that decision predated *Yeager* and was at a time when Alaska had not otherwise adopted the principle later recognized in *Yeager*.

B. The Decision Below Conflicts With *Yeager* and Other Decisions of this Court

The First Circuit's decision is irreconcilable with this Court's decision in *Yeager*. And the decision violates the longstanding rule—reflected in numerous decisions of this Court and other courts of appeals—that vacated convictions are legal nullities for *all* purposes, including collateral estoppel. There is no principled reason to treat them differently for purposes of collateral estoppel under the Double Jeopardy Clause.

1. *Yeager* holds that a jury's acquittal bars a subsequent prosecution that depends on facts the acquittal necessarily decided in the defendant's favor, full stop. 557 U.S. at 119-20. That the same jury had hung on other counts, and that hanging on those counts was inconsistent with the acquittal, does not undermine the finality of the acquittal or withdraw its preclusive effect. *Id.* at 120. *Yeager* reasoned that the jury's "inability to reach a verdict [on the hung counts] . was a nonevent" because "a jury speaks only through its verdict." *Id.* at 120-21. "Hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense." *Id.* at 124.

A straightforward application of *Yeager* bars reprosecution of the § 666 counts here. A vacated, unlawful conviction too is a "nonevent" that enjoys no respect as a matter of law or history. It "has been nullified." *Bullington v. Missouri*, 451 U.S. 430, 442 (1981). Like a hung count, a vacated conviction does *not* "bring[] to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Yeager*, 557 U.S. at 124 (quotation marks omitted). Quite the contrary, a vacated

conviction brings no finality whatsoever, because it no longer exists. If anything, a vacated conviction is *less* meaningful than a hung count. With a hung count, at least some jurors thought that the government had proven the determinative fact under the relevant law. With a conviction vacated for faulty jury instructions, one cannot say that *any* juror thought the government had proven *anything*.

Indeed, the First Circuit's decision vacating the § 666 convictions presumes that the faulty instructions potentially affected jurors' decisions. With proper instructions, the jury at a minimum might have hung on the § 666 counts, in which case *Yeager* would control. But the illegal jury instructions eliminated the possibility of a hung jury.

Nevertheless, the First Circuit below reasoned that under *Powell*, a vacated conviction eliminates the preclusive effect of an inconsistent acquittal for purposes of a subsequent prosecution. But *Powell* did not involve either a vacated conviction or a subsequent prosecution. *Powell* applied, rather, the longstanding rule on inconsistent verdicts—an acquittal does not undermine a *simultaneously rendered, valid* conviction. The Court reasoned that the valid, final judgment of conviction is entitled to respect because it is a final judgment. *Powell* thus does not mean that a valid conviction undermines the preclusive effect of an acquittal on *open* counts, nor does it suggest that an *invalid* conviction is entitled to any respect for purposes of a retrial.

As *Yeager* later explained: "*Powell* . . declined to use a clearly inconsistent verdict [*i.e.*, the acquittal] to second-guess the soundness of another verdict [*i.e.*, the conviction]." 557 U.S. at 125. "[T]hen, *a fortiori*, a

potentially inconsistent hung count could not command a different result," *i.e.*, could not be used to second-guess the soundness of the acquittal whose preclusive effect was at issue in *Yeager*. *Id.* That analysis applies equally here: "*a fortiori*," a potentially inconsistent vacated judgment cannot "command a different result" and second-guess the soundness of the acquittal.

The court below declined to apply *Yeager*'s reasoning, noting that "while a vacated conviction, like a hung count, is not a final jury verdict, *Yeager* did not rely solely on a respect-for-finality rationale." Pet. App. 18a. But that analysis misconstrues both the Court's holding in *Yeager* and its underlying rationale. This Court said finality is the decisive issue: "We must determine whether the interest in preserving the finality of the jury's judgment on the [acquitted] fraud counts . . . bars a retrial on the insider trading counts." 557 U.S. at 118.

In any event, the decision below is equally inconsistent with *Yeager*'s discussion of the difficulty of deciphering hung counts, the aspect of *Yeager* the First Circuit thought more significant. The court below concluded that, although there is "no way to decipher what a hung count represents" because "a jury speaks only through its verdict," Pet. App. 18a (quoting *Yeager*, 557 U.S. at 121-122), "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken," albeit under an erroneous view of the law. *Id.* The notion that a jury "speaks" through an unconstitutional conviction secured through faulty instructions that has been vacated as contrary to due process is anathema to our legal system. Imagine if the jury had been told it could convict under a preponderance of the evidence

standard, or was wrongly instructed on all but one element of the offense. In any event, a vacated conviction is *not* a "jury decision." Rather, this Court repeatedly has stated that, when a conviction is vacated, "the slate [is] wiped clean." *Poland v. Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington*, 451 U.S. at 442)). Indeed, the First Circuit vacated the convictions in this case precisely because that court could not say "with fair assurance" that the jury had agreed that petitioners were guilty under the correct understanding of § 666. Pet. App. 104a-105a.

The court below theorized that a vacated conviction strips an acquittal of its preclusive effect because the vacated conviction "may still suggest that an acquittal with which that conviction conflicts was the result of 'mistake, compromise, or lenity.'" *Id.* at 18a (quoting *Powell*, 469 U.S. at 65). But that notion did not carry the day in *Yeager*. Where an acquittal rests on a factual finding that logically required an acquittal on a hung count, one can equally say that "the conflicting dispositions are irrational—the result of 'mistake, compromise, or lenity.'" 557 U.S. at 132 (Scalia, J., dissenting) (quoting *Powell*, 469 U.S. at 65).

2. Beyond *Yeager*, the First Circuit's decision runs headlong into the hornbook rule that, when a conviction is vacated because it was obtained in violation of the Constitution, the conviction has "been wholly nullified and the slate wiped clean." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *see Bullington*, 451 U.S. at 442 (same). But here, the court invoked a conviction that violated the Due Process Clause to deprive petitioners of the protections of the Double Jeopardy Clause. That holding has dangerous implications that independently warrant this Court's review.

Across a variety of contexts, courts refuse to give effect to an invalid judgment, especially where that judgment is constitutionally defective. Most notably, "a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). If a criminal judgment is found unconstitutional, even on "grounds having no bearing on the validity of the fact-findings," that "reversal . . . vacates the judgment entirely, technically leaving nothing to which [courts] may accord preclusive effect." *Id.* When a criminal defendant "won his appeal and the judgment was vacated, all [adverse] factual determinations were vacated with it, and their preclusive effect surrendered." *Id.* at 444-45. The Seventh Circuit likewise has held that a vacated judgment is "a nullity and was hardly admissible" even as *evidence* supporting the formerly victorious party in a subsequent proceeding. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 864 (7th Cir. 1974).

Other courts of appeals are in accord. *See United Bhd. of Carpenters & Joiners v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 691 (D.C. Cir. 2013) ("A judgment vacated either by the trial court or on appeal has no estoppel effect in a subsequent proceeding."); *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992) (same).

The rule that vacated convictions have no collateral estoppel effect is merely one example of a categorical, equally well-settled rule: a "vacated conviction [may not] be used to the defendant's detriment." *Wilson*, 852 N.W.2d at 141 n.5. A vacated conviction may not be used to impeach a criminal defendant. *United States v. Russell*, 221 F.3d 615, 622 (4th Cir. 2000). A

vacated conviction may not be used to enhance a sentence. *Johnson v. United States*, 544 U.S. 295, 303 (2005). A vacated conviction may not be used as the predicate for a felon-in-possession charge. 18 U.S.C. § 921(a)(20). "[T]he vacatur of a conviction because of a constitutional, statutory, or procedural defect in the underlying criminal proceedings [means] there is no longer a 'conviction' for immigration purposes." *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010).

In this case, the First Circuit reasoned that, though a "vacated conviction has been 'nullified,'" Pet. App. 16a (quoting *Bullington*, 451 U.S. at 442), "the 'fact of the conviction'" remains, "[a]nd it is the 'fact of the conviction,' and not its 'attendant legal disabilities,' that is relevant to the *Ashe* analysis." *Id.* (quoting *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004)) (citation omitted). But it is not the "fact of the conviction" that the First Circuit took into account. It was the underlying factual determinations the court of appeals held were reflected in the vacated convictions. That is why the court devoted 20 pages of its opinion to exploring what the jury "necessarily decided" when it convicted the petitioners on the basis of unlawful instructions. *Id.* at 20a-33a. Reciting the "fact of the conviction" would have taken one sentence. And it is cold comfort to tell a defendant that his vacated conviction is not being used to impose any "attendant legal disabilit[y]," *id.* at 16a, when the vacated conviction is the sole reason that he remains exposed to a criminal charge carrying a 10-year sentence.

Under the First Circuit's rule, the government may retry petitioners *only* because the government previously obtained illegal convictions based on illegal

jury instructions. This holding raises serious due process concerns, casts doubt on well-settled precedent declaring illegal convictions to be nullities, and creates perverse incentives for the government in future cases to pile on duplicative charges in the hopes that one of them will stick (even if later reversed).

C. The Question Presented Is Important and Recurring, and this Case Is an Ideal Vehicle

The Double Jeopardy Clause "embodies . . . vitally important interests," and this Court accordingly has "decided an exceptionally large number of cases interpreting" it. *Yeager*, 557 U.S. at 117. And as the First Circuit recognized, "[t]his appeal raises important . . . issues." Pet. App. 2a.

1. The question whether an unlawful conviction deprives a lawful acquittal of its preclusive effect is a matter of immense significance to criminal defendants and to the administration of justice in this country. This Court has recognized that the "extraordinary proliferation of overlapping and related statutory offenses" has made it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. One study has found that Congress creates 500 new crimes per decade. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008). The collateral estoppel doctrine prevents "the potential for unfair and abusive reprosecutions" enabled by this multiplicity of statutory offenses. *Ashe*, 397 U.S. at 445 n.10.

Exacerbating the issue is Congress's penchant for enacting broadly-worded criminal prohibitions and the government's penchant for pushing interpretations even broader than Congress imagined. The government frequently wins convictions under graspingly expansive theories that are later rejected on appeal, forcing defendants to undergo the expense and anxiety of a second trial premised on a proper interpretation of the statute. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015) (Sarbanes-Oxley did not prohibit destruction of fish); *Bond v. United States*, 134 S. Ct. 2077 (2014) (statute implementing chemical weapons treaty did not cover domestic dispute); *Skilling v. United States*, 561 U.S. 358 (2010) (honest services fraud statute did not reach beyond bribes and kickbacks); *Cleveland v. United States*, 531 U.S. 12 (2000) (federal mail fraud statute did not cover state license applications).

This prosecution exemplifies both problems. The allegedly criminal conduct in this case was a single trip to Las Vegas, worth perhaps a couple thousand dollars. Pet. App. 62a-63a. On the basis of the trip the government charged Bravo and Martínez with multiple felonies: federal program bribery, traveling in interstate commerce in aid of federal program bribery, conspiring to commit federal program bribery, and conspiring to travel in interstate commerce in aid of federal program bribery, not to mention additional counts alleging violations of *repealed* Puerto Rico statutes.

Simultaneously, and over petitioners' vehement objections, the government sought instructions permitting the jury to convict petitioners of federal program bribery under a gratuity theory, rather than a bribery theory. The government argued the gratuity

theory to the jury in closing, and won a conviction based on that unlawful theory. *Id.* at 104a.

Absent intervention by this Court, the rule adopted by the First Circuit will encourage prosecutors simultaneously to overcharge and to push for far-reaching interpretations of criminal statutes, as the prosecutors did here. Prosecutors will overcharge as a form of insurance against the possibility of an acquittal on any particular count. They know that if they do, the odds are in their favor: Excluding defendants whose charges are dismissed pre-trial, 99.6% of federal criminal defendants in this country are convicted.[4] And prosecutors will push for broad interpretations of criminal statutes knowing that if their interpretation is rejected on appeal, they can simply retry the case—this time with the "opportunity to hone [their] presentation on those issues which have already been decided against" them. *United States v. Bailin*, 977 F.2d 270, 277-78 (7th Cir. 1992). From the government's perspective, trial becomes a coin toss where it is heads I win, tails I get a do-over.

Permitting the government to have multiple bites at the apple also increases the likelihood of wrongful convictions of the innocent. *Green v. United States*, 355 U.S. 184, 187-88 (1957). In this case, for example, the jury necessarily determined that petitioners *did not commit bribery*—the crime the government now wants to retry. Pet. App. 12a-15a n.5. Yet the First Circuit gave the government another chance because the government brought duplicative charges and won an unlawful conviction under an unlawful theory.

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[4] Federal Judicial Caseload Statistics (Mar. 31, 2014), Table D-4, http://www.uscourts.gov/file/10657/download.

Letting the decision below stand sanctions and rewards the government's abusive charging decisions.

2. The question presented recurs frequently. Beyond the courts in the 5-3 split, numerous decisions of federal district courts and lower state courts likewise have grappled with the question whether an acquittal precludes retrial of a vacated charge that depends on facts necessarily decided by the acquittal.[5]

Notably, the issue is recurring in large part because lower courts are in disagreement over the interplay between three decisions of this Court—*Ashe*, *Yeager*, and *Powell*. This Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Shapiro et al., Supreme Court Practice 254 (10th ed. 2013). Only this Court can clarify how

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[5] *See, e.g.*, *United States v. Cabrera*, 804 F. Supp. 2d 1261, 1267-71 (M.D. Fla. 2011) (prohibiting retrial of money laundering counts after convictions were vacated for instructional error, because acquittals on money wire fraud counts necessarily determined that defendant was innocent of an essential element of the money laundering counts); *Madsen v. McFaul*, 643 F Supp. 2d 962, 969-71 (N.D. Ohio 2009) (prohibiting retrial of kidnapping count after conviction was vacated based on ineffective assistance of counsel, because acquittal on rape charges decided a fact critical to the kidnapping charge); *Owens v. Addison*, No. 12-CV-0117-CVE-FHM, 2013 WL 1828049, at *8 (N.D. Okla. Apr. 30, 2013), *aff'd sub nom. Owens v. Trammell*, 792 F.3d 1234 (10th Cir. 2015) (holding that petitioner could be retried on vacated felony murder charge though he had been acquitted of the underlying felony); *People v. Hopkins*, No. 284631, 2009 WL 2244537, at *2 & n.2 (Mich. Ct. App. July 28, 2009) (vacating conviction for possession of a firearm during a felony for instructional error, and barring retrial because the defendant had been simultaneously acquitted of predicate felonies).

the Double Jeopardy Clause operates in this important context.

3. This case offers an ideal vehicle to consider the question presented. It is a direct appeal from a First Circuit decision that thoroughly examines the issue. This question is outcome-determinative. There is also no dispute that, in acquitting petitioners of conspiring to commit federal program bribery and traveling to commit federal program bribery, the jury necessarily determined that petitioners did not commit federal program bribery. Pet. App. 15a n.5 (the government "does not argue" that the acquittals rested on some other ground). In other words, if the Court sides with petitioners and holds that the vacated conviction is irrelevant to the collateral estoppel inquiry, this case ends.

Indeed, presumably recognizing that this case was a likely candidate for this Court's review, the First Circuit over the government's objection stayed its mandate, thereby prohibiting the government from attempting to retry this case pending this Court's decision on the petition for certiorari. This Court should grant the petition and resolve the division between federal circuit courts and state courts of last resort.

II. The Decision Below Permitting Retraction of a Judgment of Acquittal Conflicts With this Court's Decision in *Evans v. Michigan*

Certiorari is also warranted because this Court's precedent barred the district court from "withdrawing" its judgment of acquittal.

"[T]he Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation,'" such as an "'erroneous interpretations of governing legal principles.'" *Evans*, 133 S. Ct. at 1074 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), and *United States v. Scott*, 437 U.S. 82, 98 (1978)). "[T]he relevant distinction is between judicial determinations that go to 'the criminal defendant's lack of criminal culpability,' and those that hold 'that a defendant, although criminally culpable, may not be punished because of a supposed' procedural error,'" such as pre-indictment delay. *Id.* at 1077 (quoting *Scott*, 437 U.S at 98). The question is whether the trial court's action "'serve[s]' substantive 'purposes' or procedural ones." *Id.* at 1078 (quoting *Scott*, 438 U.S. at 98 n.11).

The court below held that the district court's judgment of acquittal was not "substantive" because it did not "'represent[] a resolution . . . of some or all of the factual elements of the offense charged.'" Pet. App. 37a-38a (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). But *Evans* rejected this precise test, which "reads *Martin Linen* too narrowly, and it is inconsistent with our decisions since then." *Evans*, 131 S. Ct. at 1077.

The First Circuit below never evaluated whether the district court's acquittal turned on a "procedural" error, as *Evans* requires, and it plainly did not. The First Circuit's decision in the first appeal reflected a substantive determination that "the jury explicitly rejected allegations that either the conspiracy or the Travel Act conduct implicated § 666." Pet. App. 120a. The court of appeals did not rule for petitioners on the basis of any "procedural" issue. And the order

acquitting petitioners reflected the district court's reading of the substantive determination in the first appeal. Even "erroneous interpretations of governing legal principles" still trigger Double Jeopardy. *Evans*, 133 S. Ct. at 1074.

To the extent the district court's judgment of acquittal may fall somewhere between what the Court has described as "substantive" versus "procedural," the Court should grant review to provide guidance for future cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Filed: 6/15/2015]

Nos. 14-1089, 14-1091

UNITED STATES OF AMERICA,
Appellee,

v.

JUAN BRAVO-FERNANDEZ and
HECTOR MARTÍNEZ-MALDONADO,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, *U.S. District Judge*]

Before Howard, Lipez, and Barron, *Circuit Judges*.

Martin G. Weinberg, with whom *David Z. Chesnoff*, *Chesnoff & Schonfeld*, and *Kimberly Homan* were on brief, for appellant Juan Bravo-Fernandez.

Abbe David Lowell, with whom *Christopher D. Man* and *Chadbourne & Park LLP* were on brief, for appellant Hector Martínez-Maldonado.

Vijay Shanker, United States Department of Justice, Criminal Division, Appellate Section, with whom *Leslie R. Caldwell*, Assistant Attorney General, *David A. O'Neil*, Acting Deputy Assistant Attorney General, and *Peter M. Koski*, United States Department of

Justice, Criminal Division, Public Integrity Section, were on brief, for appellee.

June 15, 2015

BARRON, *Circuit Judge*. This appeal raises important and, in our Circuit, novel issues about when an acquittal in an earlier trial may be deemed to bar, under the Double Jeopardy Clause, a new prosecution on a related offense. The legal issues arise in connection with the federal bribery prosecutions of a former member of the Puerto Rico Senate and of the former president of a Puerto Rico private security firm.

We last considered these prosecutions two years ago following a trial at which the defendants had been convicted of federal program bribery under 18 U.S.C. § 666. *See United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013). At that time, we vacated the convictions because the jury had received improper instructions about what constituted "bribery" under that statute. *Id.* at 18-27. We thus remanded for a possible new trial based on a proper theory of liability under § 666. *Id.*

In this appeal, the defendants contend that the new trial may not begin because the renewed prosecutions violate the Double Jeopardy Clause, which provides that "[n]o person [may] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In pressing this contention, the defendants make two arguments.

The defendants first argue that the Double Jeopardy Clause bars the renewed prosecutions because the jury acquitted on closely related offenses in the earlier trial and, in doing so, necessarily found that the government

failed to prove issues that the government would have to relitigate in the new prosecutions. Separately, the defendants contend that the Double Jeopardy Clause bars the renewed prosecutions because a line order that the District Court issued and then corrected days after we issued our mandate in the last appeal constituted a final and irrevocable order of acquittal on the renewed § 666 charges.

The District Court rejected both double jeopardy arguments, and so do we. We thus affirm the District Court.

I.

For purposes of the issues before us in this appeal, it is the procedural history of the case that matters most. And so we provide the relevant details of that history here.

The § 666 charges are based on a trip from Puerto Rico to Las Vegas that defendant Juan Bravo-Fernandez took with defendant Hector Martínez-Maldonado in May of 2005. The two men had traveled to Las Vegas to see boxer "Tito" Trinidad fight boxer "Winky" Wright. At the time, Bravo was the president of Ranger American, a private security firm in Puerto Rico. Martínez was a member of the Puerto Rico Senate.

A grand jury indicted the defendants in June of 2010, finding probable cause for the government's allegations concerning the connection between Bravo's payment for the trip and Martínez's support for legislation beneficial to Bravo's company. The indictment contained a number of distinct counts. These counts included violations of the federal program bribery statute, 18 U.S.C. § 666, violations of the Travel Act, 18 U.S.C. § 1952(a)(3)(A), and conspiracy, 18 U.S.C. § 371.

The Travel Act prohibits travel in interstate commerce for a criminal purpose, 18 U.S.C. § 1952(a)(3)(A). In this instance, the government alleged that the criminal purpose was both to commit the bribery that § 666 prohibits and to violate Puerto Rico bribery law.[1] The predicate offenses for the conspiracy counts were the Travel Act (in furtherance of, according to the indictment, violations of § 666 and Puerto Rico bribery law) and § 666.

After a three week trial in 2011, the jury returned split verdicts as to each defendant. The jury convicted each defendant of federal program bribery under § 666. The jury acquitted each defendant of conspiracy to violate § 666 and of violating the Travel Act in furtherance of violating § 666. In addition, the jury convicted Bravo of two other offenses: conspiring to violate the Travel Act in furtherance of (according to the verdict form[2]) unspecified "racketeering" activity, and violating the Travel Act in furtherance of violating Puerto Rico bribery law. The jury acquitted Martínez of those last two offenses. The defendants appealed each of the convictions.

In *Fernandez*, we considered the defendants' appeal and reversed or vacated all of the convictions. *Fernandez*, 722 F.3d at 39. We reversed those of Bravo's convictions that were based on Puerto Rico bribery law as predicate offenses. We did so because we held that those bribery laws had been repealed before Bravo had committed the relevant acts underlying the convictions. *Id.* at 28-34.

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[1] *See* P.R. Laws Ann. tit. 33 §§ 4360, 4363 (repealed 2005).

[2] Unlike the indictment, the verdict form did not specify § 666 and Puerto Rico bribery law as the predicate offenses for the conspiracy to violate the Travel Act charges.

We also vacated Bravo's and Martínez's convictions on the standalone § 666 counts. *Id.* at 27. Specifically, we concluded that § 666 required the government to prove that Bravo had paid for Martínez's trip to the boxing match "in exchange for" the future actions that Martínez allegedly took with respect to the legislation favoring Bravo's company. *Id.* at 19. We concluded, however, that the jury instructions allowed the jury to find a violation of § 666 even if the government failed to prove this "exchange" theory and instead proved only what we called a "gratuity" theory. *Id.* at 26-27 Under this improper gratuity theory, the government needed only to prove that Bravo had given, and Martínez had received, "a reward for" having already supported the two bills that favored Bravo's company *Id.* at 20.

After holding that the jury instructions were improper in this respect, we further concluded that the evidence supported not only the correct exchange theory but also the improper gratuity theory. *Id.* at 26-27. We thus held that the error in the jury instructions was not harmless. *Id.* On that basis, we vacated the convictions on the standalone § 666 counts. *Id.* at 27. We then remanded for possible re-prosecution of the standalone § 666 counts under that same indictment. *Id.* at 27-28. In doing so, we explained that "[t]he government may not pursue a conviction" for the § 666 counts on a gratuity theory "if [d]efendants are retried." *Id.* at 28.

Our mandate in *Fernandez* issued on October 23, 2013. The District Court assumed jurisdiction once again. Two days later, on October 25, unprompted by any party, the District Court entered a line order. That line order stated:

> ORDER re 639 U.S.C.A. Judgment and 640 U.S.C.A. Judgment as to Juan Bravo-Fernandez and Hector Martinez-Maldonado. The mandate having been issued (Docket No. 641), in accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to defendant Martinez's conspiracy count, as to defendant Bravo's conspiracy conviction, and as to both defendants' section 666 convictions. Signed by Judge Francisco A. Besosa on 10/25/2013.

Within hours, the government filed an emergency motion "to clarify" the District Court's line order. The government contended in that motion that the last clause of the line order was mistaken. The government explained—correctly, all parties to this appeal agree—that this Court's opinion in *Fernandez*, in vacating the standalone § 666 convictions, "did not order [the District Court] to enter a judgment of acquittal on the § 666 convictions."

Less than three hours after entry of the initial line order, and following the receipt of the government's motion, the District Court vacated that order. The District Court's new order specified that "[t]he defendants' section 666 convictions are VACATED."

The defendants then moved to "reinstate" the by-then vacated line order. The defendants argued that the line order constituted a judgment of acquittal that, given the Double Jeopardy Clause, could not be taken back. But the District Court disagreed and denied the motion.

Shortly thereafter, the defendants filed a new motion for acquittal on the standalone § 666 charges. In this motion, the defendants focused on the split jury verdicts. The defendants contended that, under the Double Jeopardy Clause, the acquittals of the defendants for conspiracy to violate § 666 and for violating the Travel Act in furtherance of a § 666 offense precluded any renewed prosecution on the standalone § 666 counts. The District Court denied that motion, too.

The defendants now appeal the District Court's denial of the two acquittal motions. We have appellate jurisdiction under our authority to review "pretrial orders rejecting claims" under the Double Jeopardy Clause. *Abney v. United States*, 431 U.S. 651, 662 (1977). We review the "constitutional questions" raised de novo. *United States v. Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998) (citing *United States v. Aguilar-Aranceta*, 957 F.2d 18, 21 (1st Cir. 1992), *abrogated on other grounds*, *Yeager v. United States*, 557 U.S. 110, 119 (2009)).

II.

We start by addressing the defendants' arguments about the preclusive effect of the § 666-based Travel Act and conspiracy acquittals.[3] The defendants' arguments rely on "the rule of collateral estoppel" that "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 444-

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[3] The government does not argue that the defendants waived this challenge by failing to raise it in *Fernandez*. *See United States v. Medina-Villegas*, 700 F.3d 580, 585 (1st Cir. 2012) ("The law of the case doctrine 'bars a party from resurrecting issues that either were, or could have been, decided on an earlier appeal.'" (quoting *United States v. Matthews*, 643 F.3d 9, 12-13 (1st Cir. 2011))). We thus address the challenge, as the defendants' failure to raise it in *Fernandez* does not affect our jurisdiction to consider it. *See Cohen v. Brown Univ.*, 101 F.3d 155, 168 (1st Cir. 1996).

45 (1970). Before considering whether that rule applies in this case, however, we need to say more about how the rule applies generally.

This aspect of the Double Jeopardy Clause ensures that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. In *Ashe*, the Supreme Court made clear that the rule "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book." 397 U.S. at 444. The inquiry, instead, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)).

To that end, *Ashe* instructs that we must "'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Id.* (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)). And, if a review of all that material shows that a "rational jury," as a practical matter, decided adversely to the government an issue to be relitigated in the new prosecution, then the defendant gets the benefit of collateral estoppel. *See id.* In other words, under the rule, the government may not "relitigat[e] any issue that was necessarily decided by a jury's acquittal in a prior

trial," even in a trial for a different offense.[4] *Yeager* 557 U.S. at 119 (discussing *Ashe*, 397 U.S. at 445-46).

Ashe supplies a good example of what it means to "set in a practical frame" the inquiry into what the jury necessarily decided. *Id.* at 444 (quoting *Sealfon*, 332 U.S. at 579). There, the jury had acquitted a defendant of the robbery of one victim in the basement of a home in a case that involved the robbery of multiple victims in that home at that same time. *Id.* at 437-38. The new prosecution of that defendant focused on a different one of the victims. *Id.* at 439-40. In that respect, the new prosecution involved a distinct offense. But the Court still concluded that the prior acquittal barred the government from going forward with the new prosecution. *Id.* at 446.

To reach that conclusion, *Ashe* undertook a careful review of the record in the first trial. *See id.* at 438-39. The review considered the evidence introduced, the arguments of counsel, and the jury instructions. *See id.* The Court concluded from that review that, in

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[4] Bravo contends that *Ashe*'s instruction for us to "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," 397 U.S. at 444, applies only to acquittals based on a general verdict. And Bravo points out that the defendants' trial involved a special verdict form. But while we agree with Bravo that the "special verdicts themselves must be considered" in undertaking the *Ashe* inquiry, in this case, as we will explain, the special verdict form alone does not provide enough information to resolve the defendants' arguments. We therefore, for reasons provided below, must consider the materials that *Ashe* identifies along with the special verdict form to determine whether the acquittals the jury recorded in the special verdict form necessarily decided an issue adversely to the government that the government would have to relitigate in the renewed prosecutions on the standalone § 666 counts.

acquitting, the jury had necessarily decided that the defendant was not present at the home where the victims had been robbed. *Id.* at 445. The Court then concluded that the jury's resolution of that issue adversely to the government was as determinative of the government's ability to prove its case in the second prosecution as in the first. *See id.* at 445-46. And so the Court held that the second prosecution could not go forward even though the named victim was different. *Id.*

There is, however, an important limitation on the application of the rule of collateral estoppel that, *Ashe* held, the Double Jeopardy Clause incorporates. And this limitation is of potential relevance to the collateral estoppel effect that we should accord to the acquittals on which the defendants rely here, in light of the convictions on the standalone § 666 counts that this same jury also rendered.

This limitation is set forth in the Supreme Court's decision in *United States v. Powell*, 469 U.S. 57 (1984). There, the Supreme Court explained that where "the same jury reached inconsistent results . . . [,] principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Id.* at 68. Relying on its prior holding to the same effect in *Dunn v. United States*, 284 U.S. 390 (1932), *Powell* gave the following reason for this rule: "[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Powell*, 469 U.S. at 64-65 (quoting *Dunn*, 284 U.S. at 393).

Powell acknowledged that it is, of course, possible that an acquittal that is inconsistent with a conviction still reflects a jury's finding of reasonable doubt as to guilt. *Id.* But *Powell* explained that "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the [convicted] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [acquitted] offense." *Id.* at 65.

Powell for that reason rejected the argument that, under *Ashe*, an acquittal could, via collateral estoppel, invalidate a truly inconsistent conviction that was rendered by the same jury in the same proceeding. *Id.* at 64. In such a case, *Powell* concluded, there is no way to know without speculating which of the inconsistent verdicts—the acquittal or the conviction—"the jury 'really meant.'" *Id.* at 68. The government, of course, cannot challenge the acquittals on that basis—the acquittals must stand. *See id.* But the inconsistency makes the jury's findings indecipherable. *See id.* at 65-68. And so "principles of collateral estoppel"—which require a determination of what the jury necessarily decided—are impossible to apply. *Id.* at 68.

Thus, in light of *Powell*, the defendants do not deny that a true inconsistency in what the jury has done in acquitting on one offense while convicting on another can make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal. And so long as that question cannot be answered, the acquittal cannot be given collateral estoppel effect such that it would bar a prosecution for a related offense.

Against this legal background, the defendants admit they need to show two things in order for their collateral estoppel argument to succeed and bar the renewed prosecutions on the standalone § 666 counts. The defendants need to show that the acquittals on the Travel Act

and conspiracy counts involving § 666 would, considered on their own, collaterally estop the renewed, standalone § 666 prosecutions. The defendants further need to show that, under *Powell*, the now-vacated convictions on those standalone § 666 counts do not strip the § 666-based Travel Act and conspiracy acquittals of the collateral estoppel effect that they otherwise might have. Although the defendants need to make both showings in order to prevail, the arguments the defendants make with respect to each showing are not unrelated to one another. In particular, understanding the defendants' arguments about what the acquittals show on their own helps to set the stage for many of the defendants' arguments about why those acquittals have collateral estoppel effect notwithstanding the convictions that the jury also rendered. We therefore consider each part of the defendants' collateral estoppel argument in turn.

III.

We begin by setting to one side the convictions on the standalone § 666 counts and examining whether the acquittals on the conspiracy and Travel Act counts involving § 666 would, considered on their own, support the defendants' collateral estoppel argument. To make that argument, the defendants seek to demonstrate that the jury, in acquitting on the conspiracy and Travel Act counts involving § 666, necessarily decided that the government had failed to prove that the defendants violated § 666. And the defendants further contend that the jury's finding as to the failure of proof concerned, in particular, the exchange theory of § 666 liability on which the renewed prosecutions must depend. *See Fernandez*, 722 F.3d at 19-20, 28.

We start with the defendants' contention that the acquittals show that the jury found a failure of proof as to § 666. One obstacle the defendants face in making that showing arises from the nature of the two offenses on which the jury acquitted. As to each, § 666 was implicated only as a predicate offense. And so there is a question whether the jury's acquittals concerned the predicate offense at all.

In the abstract, as the government points out, an acquittal for conspiracy does not necessarily show that the jury found that the government failed to prove that the defendant committed the predicate offense. *See, e.g., United States v. Marino*, 277 F.3d 11, 39 (1st Cir. 2002). Conspiracy requires proof of elements independent of the predicate offense, including the element that there be an agreement between "two or more persons." *See* 18 U.S.C. § 371. It is thus possible that a jury's acquittal on conspiracy reflects only that jury's finding that the government failed to prove one of those independent elements—such as the element of agreement—rather than that the government failed to prove a violation of the predicate offense.

Similarly, the Travel Act requires proof of elements, including interstate travel, that are independent of the predicate offense. *See* 18 U.S.C. § 1952. And thus, in theory, as the government also notes, an acquittal on that offense might rest only on a jury's finding that the government failed to prove one of the independent elements and not on a finding that the government had failed to prove the predicate offense itself. *See, e.g., United States v. Stafford*, 831 F.2d 1479, 1482 (9th Cir. 1987).

But the defendants argue—and the government does not contend otherwise—that the independent elements of the conspiracy and Travel Act offenses are

not material to the collateral estoppel analysis here. In support of that argument, the defendants point to the nature of the charged conduct for the predicate § 666 offense for the conspiracy and Travel Act counts.

That conduct included a trip the defendants took from Puerto Rico to Nevada to see a boxing match, in connection with support for pending legislation. The defendants thus argue that the charged conduct involved both travel and agreement. On that basis, the defendants contend—and, again, the government does not argue to the contrary—that the independent elements of travel and agreement for the conspiracy and Travel Act counts involving § 666 necessarily overlapped with elements of § 666 itself. Thus, the defendants argue, when the jury acquitted on those counts, the jury necessarily rejected liability under § 666 itself, even though § 666 was only a predicate offense for the conspiracy and Travel Act counts.

We next consider the defendants' contention that the acquittals show that the jury rejected the exchange theory of § 666 liability in particular. Here, too, the defendants contend that there is no problem. The defendants point out that the acquittals show that the jury rejected every theory of § 666 liability that the jury was given, including the exchange theory. In this way, the defendants contend that the "record of the prior proceeding," *Ashe*, 397 U.S. at 444 (quoting Mayers & Yarbrough, *supra*), shows that the acquittals on the conspiracy and Travel Act counts for which § 666 was the predicate offense do have collateral estoppel effect on the renewed, standalone § 666 prosecutions.

But even if we were to accept each step in the defendants' argument to this point, the defendants still would need to show one more thing.[5] The defendants would still need to show that the conspiracy and Travel Act acquittals do not lose the collateral estoppel effect that they otherwise might have in consequence of the convictions that the jury also rendered on the standalone § 666 counts. Accordingly, we now take up that issue.

IV.

The defendants offer two reasons for concluding that the vacated convictions on the standalone § 666 convictions do not, under *Powell*'s limitation on the rule of collateral estoppel, strip the acquittals on the conspiracy and Travel Act counts involving § 666 of collateral estoppel effect. Neither reason the defendants offer, however, is persuasive.

A.

The defendants' first reason is that the convictions on the standalone § 666 counts have been vacated and are no longer final. *See Fernandez*, 722 F.3d at 27 The defendants thus argue that the acquittals alone should be considered in determining what the jury necessarily decided under *Ashe*. And, the defendants further contend, because the acquittals, considered on their own, show that the jury did reject § 666 liability, the Double

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[5] The government does not argue that the acquittals the defendants rely on rested on a rejection of the extra elements involved in those offenses. But neither does the government expressly concede that the acquittals did reject § 666 liability. Instead, the government argues that the acquittals are "at most inconsistent" with the convictions on the issue of § 666 liability. As we find such an inconsistency, we need not decide whether the acquittals did reject § 666 liability, or whether they instead rested only on a rejection of some extra element.

Jeopardy Clause bars the renewed prosecutions on the standalone § 666 counts.

We do not agree, however, that we may not consider the vacated convictions as part of our collateral estoppel inquiry, under *Ashe*, into what the jury necessarily decided. Our reasoning on this point follows in large part from *Ashe* itself.

There, the Court instructed that, for purposes of determining the collateral estoppel effect of acquittals, we must undertake a "practical" analysis based on the "record" of the prior proceeding, and with "'an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444 (quoting *Sealfon*, 332 U.S. at 579). Like the acquittals on which the defendants rely, the convictions in this case are part of what the jury decided at trial. For that reason, *Ashe*'s expansive instruction to consider what happened in the prior proceeding points strongly in favor of taking account of not only the acquittals but also the convictions, even though they have been vacated.

The fact that a vacated conviction has been "nullified," *Bullington v. Missouri*, 451 U.S. 430, 442 (1981), moreover, does not require a different conclusion. "When a court vacates a conviction, it sets aside or nullifies the conviction and its attendant legal disabilities; the court does not necessarily attempt to erase the fact of the conviction." *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004). And it is the "fact of the conviction," and not its "attendant legal disabilities," *id.*, that is relevant to the *Ashe* analysis of what the jury's verdicts show that the jury necessarily decided.

In addition, the convictions at issue here were vacated only for trial error. *See Fernandez*, 722 F.3d at 26-27. But a "reversal for trial error . . . does not constitute a decision to the effect that the government has failed to prove its case." *Burks v. United States*, 437 U.S. 1, 15 (1978). Thus, for purposes of deciding whether the jury necessarily decided that the government failed to prove that the defendants violated § 666, the fact the jury also convicted the defendants of violating § 666 would seem to be of quite obvious relevance, even though the convictions were later vacated.

We also do not agree with the defendants that, in conducting the *Ashe* analysis, we should disregard vacated convictions because they are not meaningfully different from hung counts, which are counts on which the jury reached no verdict at all. The defendants rely for their contention on the Supreme Court's decision in *Yeager v. United States*, 557 U.S. 110.

In *Yeager*, the Court held that hung counts are, for purposes of performing *Ashe*'s collateral estoppel inquiry into what a jury necessarily decided, "not a 'relevant' part of the 'record of [the] prior proceeding.'" *Id.* at 121 (quoting *Ashe*, 397 U.S. at 444). In reaching that conclusion, *Yeager* explained that *Powell* relied on the need to respect the finality of an otherwise valid verdict in refusing to overturn a conviction that seemingly conflicted with an acquittal. *Yeager*, 557 U.S. at 124. *Yeager* reasoned in this regard that the same concern about respecting final verdicts applied equally to respecting the finality of an acquittal. *See id.* *Yeager* thus declined to allow a hung count—which was not a final verdict—to create a conflict with an acquittal—which was. *Id.*

But we do not believe *Yeager* supports treating vacated convictions like hung counts under *Ashe*. For while a vacated conviction, like a hung count, is not a final jury verdict, *Yeager* did not rely solely on a respect-for-finality rationale to explain why hung counts should not be considered for *Ashe* purposes. Nor did *Yeager* hold that a verdict that lacked finality could never bear on an acquittal's collateral estoppel effect. Instead, in refusing to conclude that a hung count could create a "truly inconsistent" verdict, *Yeager* also explained that "a jury speaks only through its verdict," and that there was "no way to decipher what a hung count represents" as a hung count represents not "a jury's decision[]" but only "its failure[] to decide." *Id.* at 121-122.

This line of reasoning in *Yeager* suggests that, under *Ashe*, vacated counts should be treated differently from hung counts. After all, vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken. In other words, vacated convictions are still part of what the jury did decide at trial. For that reason, vacated convictions on some counts do potentially bear on the question whether the jury, in acquitting on other counts, necessarily decided an issue in a manner contrary to what the government would have to prove in renewed prosecutions. *See Yeager*, 557 U.S. at 115. And that is because *Powell*'s "prudent acknowledgment" that inconsistent verdicts make it impossible to determine what a jury necessarily decided, 469 U.S. at 65, 68, is not undermined by the mere fact that a potentially conflicting conviction has been vacated. Rather, a vacated conviction may still suggest that an acquittal with which that conviction conflicts was the result of "mistake, compromise, or lenity." *Id.* at 65. And so unless the inconsistency can be resolved, "principles of collateral estoppel . . . are no longer useful." *Id.* at 68.

We thus conclude that vacated convictions, unlike hung counts, are relevant to the *Ashe* inquiry into what a jury necessarily decided when acquitting on counts related to the vacated convictions.[6] In doing so, we join the only other circuits to have decided the issue, *see United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985),[7] as well as the highest courts of New Jersey and the District of Columbia, *see State v. Kelly*, 992 A.2d 776, 789 (N.J. 2010); *Evans v. United States*, 987 A.2d 1138, 1141-42 (D.C. 2010). And although a divided Michigan Supreme Court recently came to the opposite judgment, we find the dissenting opinion in that case more persuasive on this point. *See People v. Wilson*,

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[6] To be clear, although we conclude that the vacated convictions might prevent the acquittals from collaterally estopping the renewed prosecutions, the acquittals themselves remain inviolate. They forever bar the United States from prosecuting the defendants for conspiracy and Travel Act offenses based on the charged conduct and § 666 as a predicate offense. Likewise, our taking account of the vacated convictions does not undermine the defendants' victory in getting those convictions set aside. The defendants still get the benefit of their appellate victory in *Fernandez*, as the convictions have been vacated, and the government in a second prosecution cannot present the impermissible gratuity theory.

[7] Although *Citron* and *Price* predate *Yeager*, both the Second and Fifth Circuits decided that vacated counts are relevant to the *Ashe* analysis at a time when those circuits had already ruled that hung counts should be disregarded for purposes of the *Ashe* inquiry. *See United States v. Mespoulede*, 597 F.2d 329, 332, 335-36 (2d Cir. 1979); *United States v. Nelson*, 599 F.2d 714, 716-17 (5th Cir. 1979). And the Second Circuit has continued to follow *Citron* after *Yeager*. *See United States v. Bruno*, 531 F. App'x 47, 49 (2d Cir. 2013) (unpublished).

852 N.W.2d 134 (2014); *see also id.* at 142 (Markman, J., dissenting).[8]

Thus, in undertaking our *Ashe* inquiry into the collateral estoppel effect that must be given to the acquittals on the conspiracy and Travel Act counts involving § 666, we must consider the now vacated, standalone § 666 convictions. Contrary to the defendants' contention, the fact that those convictions were overturned for trial error provides no basis for excluding them from the record that *Ashe* requires us to consider.

B.

The defendants do have a fallback position. They argue that, even if the convictions must be considered as part of the *Ashe* inquiry, the convictions do not deprive the acquittals of collateral estoppel effect. That is because, the defendants contend, the trial record shows that the convictions on the standalone § 666 counts are actually consistent with the acquittals on those counts for which § 666 was a predicate offense. And, further, the defendants contend that the verdicts

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[8] Martínez does cite an unreported decision of the Appellate Division of the Superior Court of New Jersey in which that court referred to its "inclination to regard the counts on which [it] had reversed the defendant's conviction as a nullity, analogous to a situation where there is a hung jury on certain counts." *State v. Hermalyn*, No. 06-11-2085, 2012 WL 3000334, at *1 (N.J. Super. Ct. App. Div. July 24, 2012) (per curium) (citing *Yeager*, 557 U.S. at 120). *Hermalyn* provides no explanation for that "inclination," and it appears directly inconsistent with the New Jersey Supreme Court's opinion in *Kelly*, which *Hermalyn* did not cite. *See Kelly*, 992 A.2d at 789. In *Kelly*, which like this case (and like *Hermalyn*) involved the retrial of vacated convictions, the New Jersey Supreme Court held that "*Yeager* has no application to a case involving an inconsistent verdict of acquittals and convictions returned by the same jury," as opposed to hung counts. *Id.* at 778, 789.

on those counts—though involving both convictions and acquittals—are consistent in a way that shows that the acquittals did reject the exchange theory of § 666 liability and thus should be given collateral estoppel effect to bar the renewed standalone § 666 prosecutions. Thus, the defendants argue, the convictions do not create "truly inconsistent" verdicts with respect to § 666 that would implicate *Powell*'s limitation on the collateral estoppel rule. 469 U.S. at 64.

To show how the convictions and acquittals may be reconciled in this way, Martínez explains that "[a] 'rational' jury could conclude a defendant had not committed bribery [under an exchange theory] . . . while at the same time convicting the same defendant under a gratuity theory under Section 666." And so, Martínez argues, "concluding that the jury found a gratuity and not bribery [in convicting on the standalone § 666 counts] is the logical way to reconcile the verdict." Or, as Bravo puts the point in his brief, the "only logical conclusion is that the jury rested its §[ ]666 convictions on a finding of gratuities, not §[ ]666 bribery [under the proper exchange theory], and that its verdicts on the conspiracy and Travel Act counts necessarily rejected a §[ ]666 bribery theory [under the proper exchange theory]."

In making this argument, the defendants rely solely on a claim about how the jury was instructed.[9] In particular, the defendants contend that the District Court

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[9] The defendants offer no other argument for how the jury rationally could have acquitted on the conspiracy and Travel Act counts that involved § 666 in a way that rejected only the exchange theory of § 666 liability and not the gratuity theory as well. Perhaps the defendants could have argued that a gratuity, unlike a quid pro quo exchange, involves no agreement. If a gratuity need not involve an agreement, then it could be argued that

presented the improper gratuity theory to the jury only as to the standalone § 666 counts. The defendants thus contend that—consistent with the jury instructions—the jury could have convicted on the standalone § 666 counts on the gratuity theory without having to consider (and thus reject) that same theory in acquitting on the conspiracy and Travel Act counts that involved § 666. In this way, the defendants argue, the verdicts concerning § 666—whether as a standalone or predicate offense—may be harmonized. The acquittals rejected one theory of § 666 liability (the proper one) and the convictions accepted another theory of § 666 liability (the improper one).

The Supreme Court in *Powell*—in holding that an acquittal lacks collateral estoppel effect when truly inconsistent with an accompanying conviction—did

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the § 666-based conspiracy acquittals rejected only the exchange theory of § 666 liability. A gratuity theory of § 666 liability, by not requiring that there be an agreement, would arguably not have required the jury to find conspiracy liability. But the defendants do not make such an argument for reconciling the verdicts, and so we do not address whether there is any force to the argument.

The reason the defendants do not make that additional argument, moreover, is readily apparent. The argument does not help with respect to the separate, § 666-based Travel Act acquittals. In this case, the allegedly unlawful payment took the form of an all-expenses paid interstate trip. Whether that trip was given as a gratuity or as a quid pro quo exchange, it would still involve interstate travel. And thus, if the jury concluded the trip violated § 666 then the jury should also have found a § 666-based Travel Act violation. *See* 18 U.S.C. § 1952(a)(3) (prohibiting interstate travel to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity"). Yet the jury did not do so. Thus, if the defendants' differential jury instructions argument does not hold up, then they are left with verdicts on § 666 that are unavoidably inconsistent with each other.

not directly confront an argument like this one. The defendant in *Powell* was arguing that the verdicts were inconsistent in order to compel the reversal of a conviction in consequence of a supposedly contradictory acquittal. 469 U.S. at 60. And the government, in defending the conviction against such challenge, did "not dispute the inconsistency." *Id.* at 69. The Supreme Court thus did not need to address in *Powell* how courts should determine whether verdicts are inconsistent when a defendant seeking to benefit from the collateral estoppel effect of an acquittal denies that the acquittal really is in conflict with a conviction that the jury also rendered. *See id.* Nor has the Supreme Court had occasion to address that issue in any subsequent case.

Because *Ashe* governs the defendants' underlying collateral estoppel argument, however, we believe that *Ashe*'s instruction to consider the record in the prior proceeding in determining what the jury necessarily decided is fully applicable to this aspect of the collateral estoppel inquiry. Moreover, we agree with the defendants that jury instructions are relevant to the review of the record that *Ashe* requires. *See* 397 U.S. at 444 (explaining that the inquiry should consider the "charge" to the jury); *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993) (listing "jury instructions" as among the "relevant matters" to be considered in the *Ashe* inquiry); *see also United States v. Olano*, 507 U.S. 725, 740 (1993) (describing "the almost invariable assumption of the law that jurors follow their instructions" (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987))). Relevant as well to the *Ashe* inquiry are the parties' "closing arguments." *Brown*, 983 F.2d at 202.

And so, to evaluate the defendants' fallback argument, we review the trial record—and, in particular, the jury instructions and the arguments that the parties made to the jury about the meaning of § 666—to determine whether the verdicts involving § 666 may be reconciled in the way the defendants propose. If it turns out from that review that the verdicts may be reconciled by reference to the jury instructions and the arguments of counsel, then the "assumption that the jury acted rationally and found certain facts in reaching its verdict" will be restored, and collateral estoppel principles will again be useful. *See Powell*, 469 U.S. at 68; *Wilson*, 852 N.W.2d at 151-52 n.12 (Markman, J., dissenting).

In taking up this inquiry, we are mindful that the defendants bear the burden of showing that the jury necessarily decided an issue adversely to the government that the government needs to prove in order to convict on a related offense in a new trial. *See Schiro v. Farley*, 510 U.S. 222, 232 (1994). But we are also mindful that, if "any reasonable assessment of the verdict" would lead to a reconciliation of the apparent inconsistency between the convictions and the acquittals involving § 666, we might be required to adopt that account. *Fernandez*, 722 F.3d at 34. As we put it in *Fernandez*, "[w]e will not bend over backwards to formulate some route" to allow the government to reprosecute. *Id.*

As we will explain, however, the record in this case shows that the jury was offered the same theories of § 666 liability as to every count involving § 666, whether as a predicate offense or a standalone crime. We therefore conclude that on this record no reasonable assessment of the verdicts is available that reconciles the verdicts in the way the defendants propose. And in

consequence of the inconsistency in those verdicts, we conclude that, consistent with the Supreme Court's decision in *Powell*, the defendants cannot meet their burden of showing that the acquittals involving § 666 collaterally estop the renewed, standalone § 666 prosecutions.

1.

Consider the first pair of instructions that the jury received regarding § 666. These were the ones that we held were erroneous in *Fernandez*. 722 F.3d at 26-27 The District Court began each erroneous instruction by explaining that "to find [each defendant] guilty of *bribery*, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt . . . ." (emphasis added). The instructions then went on to define "bribery" in a way that included both the proper exchange theory and the improper gratuity theory. *See id.*

Significantly, nothing in these instructions tied or restricted that definition of "bribery"—improper though it was—to the standalone § 666 counts in particular. And thus nothing about these instructions suggests that the jury was offered the gratuity theory only as to the standalone counts on which the jury convicted, and not as to the other counts involving § 666, for which § 666 was a predicate offense and on which the jury acquitted.

The written version of these instructions, moreover, was given to the jury under the heading "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)." That heading also tied the definition of bribery to § 666 as an offense without tying that definition to the standalone § 666 counts specifically. And thus, on its face, the heading did not exclude the

improper gratuity theory from applying to the other counts involving § 666 as a predicate crime—namely, the counts that resulted in the acquittals.

An examination of the jury instructions with respect to the Travel Act counts reinforces the point. The District Court instructed the jury that the government had to prove "[f]irst, that the Defendants travelled [sic] in interstate commerce; [and] [s]econd, that they did so with the intent to promote, manage, establish, carry on, or facilitate . . an 'unlawful activity,' here, a violation of Federal or Puerto Rico law regarding criminal bribery." The District Court then explained that "[t]he elements of bribery in violation of the bribery laws of the United States—specifically, Title 18, United States Code, Section 666(a)(1)(B) and 666(a)(2)—are discussed elsewhere in these instructions." In other words, the instructions on the Travel Act counts explicitly incorporated by reference the later, erroneous instructions on what was needed to convict the defendants of "bribery" under § 666. Thus, contrary to the defendants' contention, the jury had no basis for applying a different "bribery" definition in the Travel Act counts for which § 666 was a predicate offense—and on which the jury acquitted—from the "bribery" definition that the jury applied in the standalone § 666 counts—on which the jury convicted.

The jury instructions on the conspiracy counts are no different in this regard. The jury was told:

> For you to find Defendants Bravo and Martinez guilty of conspiracy, you must be convinced that the Government has proven each of the following beyond a reasonable doubt: First, that the agreement specified in the Indictment, and not some other agreement or agreements, existed between at least two people to: Commit

> bribery concerning federal funds, pursuant to Title 18, United States Code, Section 666, or; Travel in interstate commerce in aid of racketeering, pursuant to Title 18, United States Code, Section 1952 . . . .

The District Court then provided instructions on the requirements for finding an agreement, but said nothing at all at that time about what "bribery concerning federal funds, pursuant to Title 18, United States Code, Section 666" meant. And so with respect to the conspiracy counts involving § 666, the jury was not given any cause to apply a different definition of "bribery" in the conspiracy counts from that which the jury had been instructed to apply to the standalone § 666 counts.

Nor did the parties' closing arguments suggest that different theories of § 666 liability applied. In its closing argument, the government did use, in connection with the standalone § 666 counts, the "intent to influence or reward" language that we held in *Fernandez* had allowed the jury to consider the impermissible "gratuity" theory. *See* 722 F.3d at 18. But the government, like the jury instructions, used that language in defining what "bribery that involves federal funds" meant. The government thus said nothing to suggest that the gratuity theory was inapplicable to the Travel Act and conspiracy counts involving § 666.

In fact, when the government turned in its closing argument to the Travel Act counts, the government said only as to the meaning of bribery that the defendants must have traveled "with the intent to commit a crime. And here, the crime's bribery." Further, when the government turned to the conspiracy counts, the government argued expressly that "the agreement has to be to commit one of the two crimes *we've already talked about*: Federal program bribery or interstate

travel in aid of racketeering" (emphasis added). The government's closing argument, therefore, did not suggest that the definition of bribery discussed with respect to the standalone § 666 counts applied exclusively to those counts.

Finally, Martínez's counsel in his closing argument underscored the equivalence between "bribery" as used in the standalone § 666 counts and as used in the conspiracy and Travel Act counts involving § 666. Martínez's counsel argued that the jury should apply only the exchange theory of bribery. But he made that argument with respect to "Counts 1, 2, 3, and 4, and 5"—in other words, with respect to *all* of the counts (conspiracy, Travel Act, *and* standalone) involving § 666. Nothing Martínez's counsel said, therefore, suggested any difference between the definition of "bribery" the jury was to use as to any of these counts, even though the jury convicted on some and acquitted on others.[10]

We therefore conclude that the District Court instructed the jury to consider the gratuity theory of § 666 liability not only on the standalone § 666 counts, but also on the Travel Act and conspiracy counts for which § 666 was a predicate offense. And further, we conclude that the closing arguments by counsel accord with this same understanding of how the jury was to be instructed.

2.

The defendants do seize on one bit of language from *Fernandez* in support of their contention that the jury received different instructions as to some of the counts involving § 666. In *Fernandez*, we did observe that the jury received a correct bribery instruction, which allowed

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[10] Bravo's counsel also gave a closing argument, but his argument did not address the definition of bribery.

only the exchange theory, alongside the improper one that allowed both the exchange and the gratuity theories. *Id.* at 20. In doing so, we explained that this proper instruction "applied to both the Puerto Rico and federal bribery counts," whereas the erroneous instructions setting forth the gratuity theory were "instructions on the § 666 counts themselves." *Id.*

The defendants argue that this quoted language—by referring to the "§ 666 counts"—shows that we held in *Fernandez* that the jury received the improper gratuity instruction only for the standalone § 666 counts, and not for those counts involving § 666 that resulted in acquittals, each of which involved § 666 only as a predicate offense. In this way, the defendants contend that *Fernandez* supports their argument that the jury's apparently inconsistent verdicts can be reconciled by reference to the instructions the jury received.

But the defendants overread the quoted language. *Fernandez* did not decide whether "the § 666 counts" to which we said the erroneous instructions applied included *only* the standalone § 666 counts. *See id.* In context, it seems clear that by "the § 666 counts" we meant to distinguish those counts that involved § 666 from those counts that involved Puerto Rico bribery law. *See id.* We were not drawing a distinction among the "§ 666 counts," counts that in fact included the Travel Act and conspiracy counts for which § 666 was a predicate offense.

Indeed, we had no occasion in *Fernandez* to consider whether the erroneous instructions on the meaning of § 666 also applied to the Travel Act and conspiracy counts for which § 666 was a predicate offense. The acquittals on those counts were, obviously, not under review in that appeal. *See id.* at 8.

Moreover, it is not surprising that the erroneous instructions offering up the gratuity theory applied to all the counts involving § 666, and not just to the standalone § 666 counts. As we explained in *Fernandez*, courts have divided with respect to whether § 666 does or does not criminalize gratuities. *See id.* at 23-27. And while we held in *Fernandez* that § 666 does not criminalize gratuities, *id.* at 27, the District Court, in giving the erroneous instructions over the defendants' objections, evidently had determined that § 666 did criminalize gratuities. No party argued to the District Court, however, that § 666 criminalizes gratuities when the defendant is prosecuted for § 666 violations themselves, but not when § 666 serves as a predicate offense for conspiracy or Travel Act violations. Nor do the defendants advance any such argument on appeal.

For that reason, it makes perfect sense that the District Court's instructions on what § 666 prohibited were given as to all counts involving that offense, both when § 666 served as a predicate offense and when it stood alone. And, as we have just explained, the record shows that the instructions setting forth the erroneous gratuity theory of § 666 liability applied broadly to all counts involving § 666. As discussed, explicit and implicit cross-references in the jury instructions show that the erroneous instructions on § 666 were given as to all the counts that involved § 666 as a predicate offense, including the counts involving § 666 on which the jury rendered acquittals.

3.

This fact about the counts to which the jury instructions—and the arguments of counsel—applied is incompatible with the defendants' account of what the jury did. If, as the defendants contend, the jury based the now-vacated, standalone § 666 convictions

solely on a gratuity theory, then the jury should have considered that same gratuity theory and found the defendants guilty when the jury issued its verdicts on at least the Travel Act charges for which § 666 was a predicate offense.[11] After all, the instruction allowing the gratuity theory applied, by its terms, to all § 666-related counts. And yet the jury found the defendants not guilty on those § 666-based Travel Act charges. The verdicts are thus inconsistent with respect to § 666 liability, even assuming, as the defendants contend, that the convictions on the standalone § 666 counts relied only on the jury's acceptance of the gratuity theory.

If, on the other hand, the jury interpreted the instructions' conflicting definitions of "bribery" to allow for only an exchange theory of § 666 liability, then the verdicts would still be irreconcilable. And that is again because the same instructions on the meaning of bribery in § 666 were given as to all counts involving § 666. The convictions on the standalone counts would thus show that the jury found the defendants guilty

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[11] In referring to the § 666-based Travel Act charges, we do not include the conspiracy to violate the Travel Act charges. We set those conspiracy charges, as well as the charges for conspiracy to violate § 666, to one side even though, as noted above, *supra* note 9, the defendants make no argument distinguishing the conspiracy charges from the Travel Act charges in attempting to reconcile the verdicts. We limit our focus in this way because, even if the § 666-based conspiracy acquittals could be squared with the standalone § 666 convictions on the ground that a gratuity-theory § 666 violation need not have involved an agreement, *see id.*, the § 666-based Travel Act acquittals not involving conspiracy are not subject to any such squaring. The result is that the § 666-based Travel Act acquittals suffice on their own to create truly inconsistent verdicts concerning § 666 liability, and thus to prevent the defendants from meeting their burden under *Ashe* to show what the jury necessarily decided.

under the proper, exchange theory of § 666. In contrast, the acquittals on the Travel Act counts based on the § 666 predicate offense would show that the jury found the defendants not guilty under that same exchange theory of § 666. Once again, the acquittals would be inconsistent with the convictions with respect to the defendants' liability under § 666.

For that reason, the argument that we must read the verdicts consistently if possible does not, on this record, help the defendants meet their burden under *Ashe*. And that is because no consistent reading of the verdicts is available—given this record—that would support, under *Ashe*'s practical inquiry, the defendants' favored conclusion: namely, that the jury acquitted the defendants on the exchange theory of § 666 and convicted the defendants only on the gratuity theory.

Of course, it is possible that the jury did actually find the defendants guilty on the standalone § 666 counts only on the basis of a gratuity theory and not on the basis of an exchange theory. And it is also possible that the jury considered (and rejected) only the exchange theory in acquitting on the Travel Act counts involving § 666. But it was equally possible in *Powell* that the jury "really meant" to acquit rather than to convict, when the jury did both, and yet that mere possibility did not lead the Court to give the acquittal collateral estoppel effect. *Powell*, 469 U.S. at 68.

So, too, here. Nothing about the instructions or the record in the prior proceeding suggests that the jury did what the defendants necessarily contend that the jury did—depart from the District Court's instructions and rely on different theories of § 666 liability in assessing the different counts involving that offense. We could therefore come to such a conclusion only by engaging in the sort of "pure speculation" or "inquiries

into the jury's deliberations" that *Powell* forbids. *Id.* at 66. And such a speculative exercise could hardly suffice to satisfy the defendants' burden under *Ashe* of showing that "the issue whose relitigation [they] seek[] to foreclose was actually decided" in the prior proceeding. *Schiro*, 510 U.S. at 233.

C.

The defendants do make one final argument on behalf of their attempted reconciliation of the acquittals and the convictions that involve § 666. The defendants point to this Court's handling of a separate collateral estoppel issue in *Fernandez*. *See* 722 F.3d at 29-33. The defendants argue that this aspect of our decision in *Fernandez* supports the conclusion that the jury's acquittals of the defendants on the counts for which § 666 is a predicate offense were consistent with the jury having convicted the defendants on the standalone § 666 counts. *See id.*

But our analysis in *Fernandez* does not compel a finding of collateral estoppel here. In fact, if anything, our analysis of the collateral estoppel issue in *Fernandez* shows why, in light of this record, a finding of collateral estoppel here would be unwarranted given *Powell*'s rule against speculating about what a jury did in the case of truly inconsistent verdicts.

The collateral estoppel issue arose in *Fernandez* in the following way. The jury had convicted Bravo of conspiring to violate the Travel Act in furtherance of unspecified "racketeering" activity. 722 F.3d at 34. We had vacated that conviction. *Id.* We did so because of the possibility that the "racketeering" activity the jury found had concerned violations of the Puerto Rico bribery law—a law that had been repealed before the relevant

actions the defendants had undertaken—rather than violations of § 666. *Id.*

Bravo then sought to foreclose his future prosecution for conspiracy to violate the Travel Act in furtherance of § 666 violations specifically. *See id.* at 33. We interpreted Bravo's argument against such a future prosecution as being based on the collateral estoppel rule contained in *Ashe*. *Id.* at 33 & n.25. Specifically, Bravo contended that his acquittals on the same offenses on which the defendants now rely—conspiracy to violate § 666 and a Travel Act violation based on § 666—barred his future prosecution for conspiracy to violate the Travel Act in furtherance of a § 666 violation. *See id.* at 33-34.

To resolve Bravo's collateral estoppel argument, we decided we needed to determine what "racketeering" activity the jury had decided Bravo engaged in when the jury convicted him of conspiracy to violate the Travel Act. *Id.* at 34. And the two possibilities we identified were a § 666 violation and a violation of Puerto Rico bribery law. *Id.* at 29. Only if the unspecified "racketeering" activity underlying the conviction had been based on a violation of Puerto Rico bribery law rather than of § 666 could Bravo succeed in pressing his collateral estoppel argument against being retried for conspiring to violate the Travel Act in furtherance of a § 666 violation. *See id.* at 34.

Our inquiry into which of those offenses was the "racketeering" activity on which the vacated conspiracy conviction rested turned out to be an easy one. The jury had acquitted Bravo on the charge that he had conspired to violate § 666 and on the charge that he had violated the Travel Act in furtherance of a § 666 violation. *Id.* In contrast, the jury had convicted Bravo

on the charge of violating the Travel Act in furtherance of a violation of Puerto Rico bribery law. *Id.*

Taking a "practical, realistic view" of the verdicts, we concluded from these other verdicts that Bravo's (facially ambiguous) conspiracy to violate the Travel Act conviction had been based on Puerto Rico bribery law violations, and not § 666. Only that conclusion, we explained, harmonized the verdicts without creating any inconsistency among them. *Id.* at 34. And, in consequence of that conclusion about what the jury had done, we concluded that the conspiracy to violate the Travel Act conviction—at least if we assumed the jury had acted rationally—did not contradict the acquittal on the Travel Act and conspiracy charges that had § 666 as a predicate offense. *Id.* We then held that the latter acquittals did collaterally estop Bravo's renewed prosecution for conspiring to violate the Travel Act in furtherance of violating § 666. *Id.*

Fernandez does show that the defendants' approach of using acquittals on separate counts to clarify the basis for an ambiguous conviction has potential force. But the parties in *Fernandez* did not raise, and so *Fernandez* did not address, the question that is the crucial one in this appeal: whether the conspiracy and Travel Act acquittals based on § 666 may be given any collateral estoppel effect at all given their inconsistency with the standalone § 666 convictions.

The government made no such argument in *Fernandez*. Rather, the government's sole *Powell*-based argument in *Fernandez* was the contention that *Powell* showed that Bravo's conviction for conspiracy to violate the Travel Act was still valid even if that conviction was inconsistent with other verdicts. And so, in concluding that the § 666-based conspiracy and Travel

Act acquittals precluded a future prosecution for conspiracy to violate the Travel Act, our analysis did not address the standalone § 666 convictions, or their relevance to the collateral estoppel effect that the § 666-based Travel Act and conspiracy acquittals should be given.

In this case, by contrast, the government squarely raises the argument that, under *Powell*, the convictions on the standalone § 666 counts are inconsistent with the acquittals on the § 666-based conspiracy and Travel Act charges, and thus deprive those acquittals of the collateral estoppel effect that the defendants ask us to give them. And so we have been obliged to consider the effect of the standalone § 666 convictions. As we have explained, however, those convictions, unlike the conviction for conspiracy to violate the Travel Act based on unspecified "racketeering" activity at issue in *Fernandez*, cannot be reconciled with the jury's decision to acquit on at least the § 666-based Travel Act offense. Our earlier discussion of the jury instructions and the parties' arguments shows why.

In consequence of this conflict in the verdicts, we may not speculate that the facially inconsistent verdicts nonetheless necessarily reflect a rejection of § 666 exchange-theory liability, when they equally could reflect a finding of such liability. *See Powell*, 469 U.S. at 66. Our consideration of the convictions therefore prevents us from concluding that there is an available consistent reading of all of the jury's verdicts that would lead us to give the collateral estoppel effect to the Travel Act and conspiracy acquittals based on § 666 that the defendants now seek in this appeal. We therefore affirm the District Court's denial of the defendants' motion for a judgment of acquittal.

V.

That brings us to the defendants' final, separate double jeopardy argument. This argument relies on the District Court's October 25, 2013, line order. The District Court entered that line order two days after this Court's mandate in *Fernandez* issued. The line order directed entry of a judgment of acquittal on the standalone § 666 counts. The defendants thus contend that this line order constituted an irreversible acquittal of the defendants of those counts under the Double Jeopardy Clause.

The defendants base this challenge on the well-established rule that "the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'" *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). And that rule, the Supreme Court has held, prohibits even the court that entered a judgment of acquittal from reconsidering that judgment under at least some circumstances. *See Smith v. Massachusetts*, 543 U.S. 462, 469-75 (2005).

Whether an order counts as an "acquittal," however, is a question of substance and not of name.[12] *See Evans*, 133 S. Ct. at 1078. The determinative question is thus "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some

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[12] The government does not argue in this case that the October 25 order lacked double jeopardy effect because that order was entered before a new jury had been sworn following this Court's remand. *Cf. United States v. Tobin*, 552 F.3d 29, 31 (1st Cir. 2009) ("[J]eopardy (here, after a vacatur of a conviction and a remand) does not attach until a jury has been sworn."). We therefore do not address that issue.

or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

Here, the District Court's October 25 line order is not an acquittal under the substantive test that *Evans* and *Martin Linen* require that we apply. In *Martin Linen*, the Supreme Court found an acquittal where the district court ruled for the defendant on a motion for judgment of acquittal that the defendant made under Federal Rule of Criminal Procedure 29(c). 430 U.S. at 571-72. The district court had "plainly granted the Rule 29(c) motion on the view that the Government had not proved facts constituting criminal contempt." *Id.* at 572. It was thus "plain that the District Court . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.*

No such evaluation by the District Court is "plain," or even hinted at, by the record in this case. The line order itself states that it was entered "in accordance with" this Court's mandate. That statement suggests that the line order was merely intended as a ministerial act to carry out this Court's instructions—whatever they may have been—and not an application of law to fact regarding the defendants' "lack of criminal culpability." *Evans*, 133 S. Ct. at 1077 (quoting *United States v. Scott*, 437 U.S. 82, 98 (1978)). For that reason, the line order does not amount to a substantive acquittal by the District Court under *Evans* and *Martin Linen*.

The District Court confirmed as much in its opinion denying the defendants' motion to reinstate that order. The District Court characterized the line order's reference to acquittals—in carrying out this Court's mandate—as "an error of transcription, not an error of law." The District Court further explained that "[t]he very use of a line order, which contained no analysis

and indicated the Court's mere intent to follow the First Circuit Court of Appeals' directives, exemplifies that the [District] Court did not intend to *sua sponte* acquit defendants of the section 666 charges." And the circumstances of the order—which came immediately after this Court's mandate, and unprompted by any party and thus not in response to an acquittal motion—are consistent with the District Court's characterization of its line order.[13] We thus conclude that the District Court's line order did not constitute an acquittal under the Double Jeopardy Clause, and thus the Double Jeopardy Clause did not prevent the District Court from reconsidering it.[14]

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[13] We note that the defendants do not identify any action they took in their cases in reliance on the District Court's order before the District Court vacated it. *See Smith*, 543 U.S. at 474 ("Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury."); *United States v. Hill*, 643 F.3d 807, 867 (11th Cir. 2011) (reconsideration permitted where "[n]othing was done, or could have been done, in reliance on the acquittal ruling between the time that ruling was announced and the time it was rescinded"); *United States v. Lucas*, 516 F.3d 316, 338 (5th Cir. 2008) (no double jeopardy violation where the district court granted acquittals and then, after a weekend recess, changed its mind, as reconsideration came "before the trial progressed any further"). Nor could the defendants possibly do so, as nothing happened in the District Court in the interim. We also need not consider here whether a concrete showing of reliance unconnected to the proceedings themselves could be relevant to our analysis, as the defendants have not made any such showing here.

[14] The defendants contend that the District Court lacked authority under Federal Rule of Criminal Procedure 36 to reconsider its line order. That Rule allows courts to correct "at any time a clerical error arising from oversight or omission." Fed. R. Crim. P. 36. But whether or not Rule 36 applied in this context, district courts have the inherent authority to reconsider their interlocutory orders outside the sentencing context. *See, e.g.*,

VI.

For the foregoing reasons, the District Court's denials of the defendants' motions to "reinstate" the October 23 line order and to enter a judgment of acquittal on the standalone § 666 counts are *affirmed*.

United States v. Aguirre, 214 F.3d 1122, 1124 (9th Cir. 2000) ("[D]istrict courts generally have 'inherent authority' to decide motions for reconsideration and rehearing of orders in criminal proceedings." (quoting *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1028 (9th Cir. 1999))). In any event, the defendants' Rule 36 argument is not grounded in the Double Jeopardy Clause, and so we lack appellate jurisdiction to address that argument in this appeal. *See Abney v. United States*, 431 U.S. 651, 663 (1977); *see also United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978) ("Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed: 12/23/2013]

Criminal No. 10-232 (FAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN BRAVO-FERNANDEZ;
HECTOR MARTINEZ-MALDONADO,

Defendants.

MEMORANDUM AND ORDER

BESOSA, District Judge.

The First Circuit Court of Appeals has vacated defendants Bravo and Martinez's 18 U.S.C. § 666 convictions and remanded the case for further proceedings. *United States v. Fernandez*, 722 F. 3d 1, 39 (1st Cir. 2013). Explaining that the jury instructions permitted the jury to convict under a legally erroneous gratuity theory, the court of appeals indicated that "[t]he government may not pursue a conviction on that ground if Defendants are retried." *Id.* at 28. Defendants now contend that despite the theoretical availability of bribery as the viable theory under which a second section 666 conviction could be pursued, "the record makes clear that the jury rejected that any bribery occurred in this case through its acquittals on the

conspiracy and Travel Act charges." (Docket No. 652 at p. 1.) They argue that double jeopardy prevents the government from relitigating federal bribery, and that acquittals on the section 666 charges are warranted. Because the defendants fail to meet their burden under the collateral estoppel doctrine, the Court **DENIES** their motions.

I. Issue Preclusion/Collateral Estoppel Standard

The "collateral estoppel" or "issue preclusion" prong of the Double Jeopardy Clause of the Fifth Amendment "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Fernandez*, 722 F.3d at 33 (citing *Yeager v. United States*, 557 U.S. 110, 117-18 (2009); *Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970); and *United States v. Orrego-Martinez*, 575 F.3d 1, 6 (1st Cir. 2009)). "The burden of demonstrating that the issue was actually decided in the first prosecution rests upon the defendant." *United States v. Lanoue*, 137 F.3d 656, 662 (1st Cir. 1998); *Dowling v. United States*, 493 U.S. 342, 350 (U.S. 1990).

Although a defendant need not satisfy "a standard of absolute certainty," he or she carries the burden of proving "unequivocally" that the jury verdict necessarily included an implicit factual finding in the defendant's favor. *See United States v. Marino*, 200 F.3d 6, 10 (1st Cir. 1999) (citing *United States v. Aguilar-Aranceta*, 957 F.2d 18, 25 (1st Cir. 1992) (abrogated by *Yeager* on other grounds)). To decipher what a jury has necessarily decided, courts should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, 557 U.S. at 119-20. "The inquiry must be set

in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (citing *Ashe*, 397 U.S. at 444). The First Circuit Court of Appeals has explicitly held that "[w]here it is impossible to determine whether the particular issue was previously resolved in a defendant's favor, preclusive effect must be denied." *Lanoue*, 137 F.3d at 662.

II. The Parties' Arguments

Defendants point to the jury's verdicts on counts I and II[1] to argue that "the jury made repeated findings of fact that demonstrate that no bribery occurred in this case." (Docket No. 652 at p. 3); (Docket No. 645 at p. 2. n. 2.) ("The [a]cquittal on the conspiracy count means there was no agreement to commit bribery, and the acquittal on the Travel Act counts predicated on Puerto Rico bribery charges also means no bribery occurred. The government cannot relitigate those facts."). They claim that the jury unanimously rejected the notion that there was a conspiracy to offer or receive things of value in violation of section 666, and they attempt to make factual deductions to arrive at the conclusion that the jury's finding must reflect a rejection of both the gratuity and bribery theories of section 666 liability. (Docket No. 652 at pp. 3-5.) Simi-

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[1] Count I of the Indictment charged defendants with violating 18 U.S.C. § 371 by conspiring to: (a) commit federal program bribery, and (b) travel in interstate commerce in aid of racketeering. (Docket No. 1 at pp. 5-6.) Count II charged defendants with violating 18 U.S.C. § 1952(a)(3)(A) by traveling in interstate commerce with the intent to "[p]romote, establish, carry on, and facilitate the promotion, establishment, and carrying on, of an unlawful activity," specifically (a) federal program bribery in violation of § 666, and (b) bribery in violation of P.R. Laws Ann., tit. 33, §§ 4360 and 4363. (Docket No. 1 at pp. 19-20.)

larly, defendants claim that it would have been impossible for the jury not to have found facts to satisfy certain elements of the Travel Act charges, and thus they aver that the jury must have "rejected the notion that either defendant engaged in conduct that would violate § 666 . . . ." *Id.* at pp. 6-7.

III. Analysis

There is no question that federal bribery was an issue before the jury in the first trial. On the verdict form, the jury explicitly *convicted* defendant Bravo of federal program bribery in count IV, and defendant Martinez of federal program bribery in count V.[2] (Docket No. 438 at p. 5.) That unanimous finding necessarily means that the jury found all elements of section 666 federal program bribery to be proven beyond a reasonable doubt.[3] The First Circuit Court of Appeals

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[2] Defendants first seek for the Court to avoid altogether the consideration of counts IV and V, claiming that "a vacated conviction is as meaningless as a hung count," and "[a]s a nullity, the Court cannot give a vacated conviction any continuing effect." (Docket No. 652 at p. 8.) As a threshold matter, defendants provide no convincing authority that the Court must decide their double jeopardy claim solely by analyzing the jury's findings on counts I and II and without referencing the jury's findings on counts IV and V (*See* Docket No. 652 at pp. 7-8; Docket No. 664 at p. 5.) In this case, defendants' conspiracy convictions in counts IV and V were vacated for legal error, and it is precisely the jury's findings of fact "on all counts, including the special verdicts, [] viewed in their entirety" that need to be analyzed in order to determine what the jury necessarily decided. Accordingly, the Court will consider the jury's findings in counts IV and V.

[3] Accordingly, the jury unanimously agreed that defendant Bravo gave, offered, or agreed to give any thing of value to any person; that defendant Bravo did so corruptly with the intent to influence or reward an agent of the Puerto Rico government in connection with any business, transaction, or series of transac-

vacated those convictions, however, due to legal error; the court of appeals held that the jurors were permitted to convict under an impermissible gratuity theory as well as a bribery theory. *Fernandez*, 722 F.3d at 26-27. In arguing that "the *only* way that the jury's verdicts can be interpreted is as a rejection of a bribery theory," (Docket 672 at p. 1), defendants essentially ask the Court to find from counts I and II that the jury convicted defendants of counts IV and V *on a gratuity theory* alone. The Court's task now is to determine whether the issue of section 666 federal bribery *under the bribery theory* was indeed decided in the defendants' favor. Upon review of the record and in light of the *Fernandez* opinion, the Court cannot find a single, definitive answer. The inherent uncertainty involved

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tions of the Puerto Rico government; that this business, transaction, or series of transactions involved any thing of a value of $5,000 or more; and that the Puerto Rico government, in a one-year period preceding May 15, 2005, or during the one-year period following May 15, 2005, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. (Docket No. 433 at p. 29.)

Similarly, the jury unanimously agreed that defendant Martinez was an agent of the Commonwealth of Puerto Rico government whose duties included those of an elected Senator of the Commonwealth of Puerto Rico, as charged; that defendant Martinez solicited, demanded, accepted or agreed to accept any thing of value from another person; that defendant Martinez did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction, or series of transactions of the Puerto Rico government; that this business transaction or series of transactions involved any thing of a value of $5,000 or more; and that the Puerto Rico government, in a one-year period preceding May 15, 2005, or during the one-year period following May 15, 2005, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. (Docket No. 433 at pp. 33-34.)

in arriving at that conclusion prevents defendants from meeting their burden and precludes the Court from granting defendants' motion.

To begin, the Court cannot accept defendants' argument that when the jury checked "no" as to the federal program bribery predicates for liability in counts I and II, "that was a unanimous acquittal" that may be interpreted as such in a double jeopardy issue preclusion analysis. (Docket No. 670 at p. 2.) The government interprets the same language and check marks on the verdict form to be "non-findings—i.e., guilty verdicts in which the jury merely did not unanimously agree on a particular supporting basis for that verdict." (Docket 668 at p. 5.) Reading the check marks as the jury's "unambiguous[][4] stat[ement] on the verdict form that Bravo did *not* conspire to violate § 666," the First Circuit Court of Appeals noted, "the jury did render a conspiracy judgment with respect to Section 666, rejecting federal bribery as a direct object of the conspiracy." *Fernandez*, 722 F.3d at 34. Those statements tend to weigh in favor of the defendants' interpretation of the verdict form. The First Circuit Court of Appeals' interpretation of any *unanimity* reflected by the check marks, however, better supports the government's view. *See Fernandez*, 722 F. 3d at 34-35 ("In other words, although the jury was unanimous in finding that Martinez was guilty of conspiring to do something illegal, they were not unanimous in their view of what the illegality was."). Pursuant to that reasoning, the "no" check marks on the federal program bribery predicates in counts I and II could indicate the jury *did not unanimously find* section 666 bribery to be the object of the conspiracies

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[4] The Court must note defendant Bravo's *misleading* and *erroneous* citation to the First Circuit Court of Appeals' term "unambiguous" as "unanimous." (*See* Docket No. 672 at p. 2.)

in count I and the underlying racketeering of travel in count II. That is not equivalent to stating that the jury *unanimously found* that section 666 bribery was *not* the object of the conspiracy or predicate of the travel, or even further, as defendants argue, that the jury unanimously rejected that bribery occurred at all. The confusing format of the verdict form does not preclude the possibility that the jury's check marks could represent hung counts—not acquittals—that *Yeager* would preclude the Court from reviewing in an issue preclusion double jeopardy analysis. There is an alternate interpretation to defendants' interpretation of the verdict form that obscures the conclusion. Given the further difficulty of conclusively discerning what facts and theories underlaid the jury's check marks, the Court is not convinced that issue preclusion is warranted.

Even if the jury's "no" check marks in counts I and II were interpreted to be unanimous findings of acquittal, the Court is not persuaded that it can glean the underlying facts and theory used to make those findings. Without conclusive proof as to what factors were at play in the jury room, the Court disagrees that the jury's findings on the verdict form signify an "unequivocal" rejection of the bribery theory. Pointing to evidence presented at trial, defendants argue there is no question that an agreement existed between Bravo and Martinez, overt acts were taken, and that interstate travel occurred; they thus contend that *the only way* the jury could have checked "no" next to the section 666 predicates in counts I and II is if the jury did not find all elements of a section 666 claim itself to be met. (Docket No. 652 at pp. 3-7.) Taking counts I and II together in isolation, defendants' reading may be plausible. If the jury's "no" check marks next to the federal program bribery object of conspiracy in count I and the federal program bribery predicate of the

Travel Act in count II *truly indicated* a total rejection of bribery, however, it seems to the Court that acquittals as to the substantive bribery counts IV and V necessarily would have followed.[5] *See United States v. Aguilar-Aranceta*, 957 F.2d 18, 24 (1st Cir. 1992) (abrogated on other grounds) (assuming that the jury acted rationally and concluding that because knowledge was an element of one count, a rational jury "could not have been so inconsistent as to find 'no knowledge' as to one count[] and 'knowledge' as to the other"). The fact that the jury unanimously found that all elements of the substantive section 666 charge *were met* when they convicted defendants of counts IV and V would seem to suggest, contrary to defendants' theory, that at least one *other* element of the conspiracies in count I and the Travel Act in Count II was not satisfied. The crux of defendants' argument—that a rational jury *could not* have found the absence of an agreement, an overt act, or interstate travel—supports a competing interpretation of the jury's findings: that the jury acted irrationally and the verdict simply was inconsistent.

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[5] Defendants appear to disagree. They initially argue that the jury's check marks in counts I and II reflect "a rejection of both [the bribery and gratuity] theories," (Docket No. 652 at p. 3), but later claim that a rational jury "could conclude a defendant had not committed bribery . while at the same time convicting the same defendant under a gratuity theory under Section 666." (Docket No. 652 at p. 8.). Thus, they aver, "a conclusion that the jury found a gratuity and not bribery is the logical way to reconcile the verdict." *Id.* at 8.

The Court cannot subscribe to defendants' view that the jury convicted only when it was given the "reward" language in count III and acquitted every time it was told it had to find "in exchange for" bribery, thus indicating that the gratuity instructions were decisive. All jury instructions were considered as a whole, and instructions relevant to counts I and II directed the jury to consider the erroneous section 666 instructions

United States v. Powell, 469 U.S. 57, 69 (1984) ("It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the [substantive section 666] offense and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."). As the Supreme Court has enlightened, "issue preclusion is predicated on the assumption that the jury acted rationally," *Yeager v. United States*, 557 U.S. 110, 124 (2009), and "[the] most that can be said [of inconsistent verdicts] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions . . . ." *Dunn v. United States*, 284 U.S. 390, 393 (1932). Once a jury reaches inconsistent results, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Powell*, 469 U.S. at 68 (1984) (emphasis added). The possibility that the jury acted irrationally and issued inconsistent verdicts in this case is not, as defendants would have the Court believe, "quite beside the point," (Docket No. 672 at p. 3); rather, it is a competing theory whose mere existence, coupled with the ambiguous jury instructions,[6] is fatal to defendants' issue preclusion claim. *See Marino*, 200 F.3d at 11 (affirming a district court's denial of collateral estoppel because of ambiguous jury instructions and the apparent irrationality of the jury's verdicts) (internal citations omitted).

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[6] "In order to demonstrate a unanimous vote, the face of a verdict sheet may not alone be sufficient Jury instructions are part of that analysis." *United States v. Merlino*, 310 F.3d 137, 142 (3d Cir. 2002) (citing *Marino*, 200 F.3d at 8-11 in favor of rejecting defendants' collateral estoppel arguments because "their jury charge contained considerable ambiguity").

Given the legal errors in the jury instructions, the Court is unpersuaded that any definitive conclusion about the underlying facts or theory can be gleaned from the check marks in counts I or II. The First Circuit Court of Appeals has ruled that the jury instructions regarding section 666 were contradictory and legally erroneous:

> While the language in Jury Instruction 22 correctly states the requirements for a bribery conviction, it was not sufficient to offset the flatly contrary language in Jury Instructions 20 and 21. This is particularly so because the gratuities theory was offered in the instructions on the § 666 counts themselves, whereas the correct bribery language was in a subsequent global instruction that applied to both the Puerto Rico and federal bribery counts.

Fernandez, 722 F.3d at 20. It is clear that certain paragraphs within those jury instructions "had no place in the § 666 instructions," *id.* at 26, and that the jury instructions regarding bribery in this case were not relatively straightforward; rather, "their jury charge contained considerable ambiguity." *See Marino*, 200 F.3d at 10; *see also Merlino*, 310 F.3d at 142 ("Because, however, of the supplemental instructions given by the District Court, [the jury's] check marks are ambiguous."). Given that the jury instructions for the conspiracy charge required the jury to find beyond a reasonable doubt that an agreement existed "to commit bribery concerning federal funds, pursuant to 18 U.S.C. § 666," (Docket No. 433 at p. 18), and that the jury instructions for the Travel Act charge directed the jury to search for the elements of section 666 "elsewhere in these instructions," (Docket No. 433 at pp. 21-22), the Court cannot rule out the likely possibility that the

jury considered the erroneous and "flatly contrary" jury instructions #20 and #21 in deciding counts I and II. Considering the jury instructions and verdict form, as well as all circumstances from the proceeding, the Court is unable to glean whether the bribery or gratuity theory was selected as the basis for analyzing counts I and II. It agrees with the government that defendants present a convoluted approach of "meander[ing] through competing interpretations of the jury's seemingly inconsistent verdict[7] in an effort to patch together a conclusion that requires the Court to act as an independent factfinder," (Docket No. 663 at p. 3), and it finds defendants' theory to impermissibly require substantial "speculation into what transpired in the jury room." *See Yeager*, 557 U.S. at 122. Neither the Court nor the parties have an ability to seek conclusive proof as to what factor was at play in deliberation, and defendants' attempt to discern underlying factual determinations in the jury's verdict "is not reasoned analysis; it is guesswork." *See Yeager*, 557 U.S. at 121-22. The lack of certainty as to what findings were made by the jury in this case precludes the Court from applying the collateral estoppel doctrine to the counts involving section 666. As the First Circuit Court of Appeals noted:

> While normally we presume juries follow their instructions, the more tenebrous those instructions, the more difficult it may be for

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[7] *United States v. Standefer*, 610 F.2d 1076, 1095 (3d Cir. 1979) ("The precise determination of what a jury decided and why can be particularly difficult In jury cases[,] verdicts frequently are internally inconsistent. It is for this reason that the law long ago abandoned the search for absolute consistency in jury verdicts, however desirable such a result might be in the abstract.") (citing *Dunn*, 284 U.S. at 393).

> defendants to demonstrate unequivocally on appeal that the jury necessarily predicated its verdict on a particular finding. So it is here, since we cannot determine with any reasonable degree of reliability that the jury interpreted the pertinent aspects of its charge in the manner asserted by [defendants].

Marino, 200 F.3d at 10.

Finally, although the First Circuit Court of Appeals did not explicitly conclude that the theory upon which the jury convicted defendants of section 666 is unclear, its reasoning, coupled with its ultimate decision to vacate and remand the defendants, appears to support such a finding. *See Fernandez*, 722 F.3d at 20 ("The evidence showed that Martinez supported the Senate Projects *after* the Las Vegas trip—he voted in support of both bills within a week of returning—**which is consistent with a quid pro quo, and therefore with a bribery theory.**") (bolded emphasis added); *Id.* ("However, he *first* took actions in support of Senate Projects 410 and 471—such as submitting the bills to the Senate—weeks or months *before* the trip to Las Vegas, **which is consistent with a gratuity theory.**") (bolded emphasis added). Tasked with determining "whether the judgment . . . should be vacated and the case remanded for further proceedings," the First Circuit Court of Appeals invoked the double jeopardy issue preclusion analysis to determine the fate of Bravo's conspiracy conviction in count I. It refrained, however, from engaging in that analysis as to the section 666 charges in counts IV or V. **This is so, despite the defendants' explicit argument before the First Circuit Court of Appeals that "[t]he jury *rejected* the government's theory of bribery,"** (Court of Appeals Case No. 12-1290,

Document No. 00116373686, p. 51.), and "the logical conclusion of his argument" also implicated the collateral estoppel prong of the double jeopardy clause. *See Fernandez*, 722 F.3d at 33 n. 25.

IV Conclusion

Defendants have not met their burden of demonstrating that double jeopardy collateral estoppel precludes the government from retrying them on the section 666 charges. Given the ambiguities in the jury verdict form and the jury instructions, as well as the possibility that the jury acted irrationally in issuing an inconsistent verdict, it is impossible to determine whether the jury necessarily decided the issue of bribery in defendants' favor, and preclusive effect must be denied. *See Lanoue*, 137 F.3d at 662. Accordingly, the Court will not grant defendants' motion. *See Aguilar-Aranceta*, 957 F.2d at 25 ("Only an **unequivocal** showing that the issue sought to be foreclosed by the defendant from subsequent reconsideration **was definitely, and necessarily decided** by a jury in a final judgment, and in the defendant's favor, will convince us to collaterally estop the government from relitigating that issue in the second trial.") (emphasis added).

IT IS SO ORDERED.

San Juan, Puerto Rico, December 23, 2013.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Filed: 11/08/2013]

Criminal No. 10-232 (FAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN BRAVO-FERNANDEZ;
HECTOR MARTINEZ-MALDONADO,

Defendants.

ORDER

On June 26, 2013, the First Circuit Court of Appeals issued an opinion directing this Court to enter a judgment of acquittal on the conspiracy charges against the defendants. *United States v. Fernandez*, 722 F. 3d 1, 39 (1st Cir. 2013). The First Circuit Court of Appeals also vacated the defendants' 18 U.S.C. § 666 convictions and remanded the case for further proceedings consistent with its opinion. *Id*. On October 25, 2013, this Court entered a line order to follow the First Circuit Court of Appeals' mandate. (Docket 642.) The line order read in full:

> ORDER re 639 U.S.C.A. Judgment and 640 U.S.C.A. Judgment as to Juan Bravo-Fernandez and Hector Martinez-Maldonado. The mandate having been issued (Docket No.

> 641), in accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to defendant Martinez's conspiracy count, as to defendant Bravo's conspiracy conviction, and as to both defendants' section 666 convictions.

Id.

Later that day, through the government's motion for clarification, (Docket 643), the Court became aware of its oversight in its line order. Instead of *vacating* both defendants' section 666 convictions, the Court entered an order of *acquittal*, contrary to the Court of Appeals' mandate. To remedy the oversight, the Court immediately vacated the entire order, this time directing the Clerk "to enter a Judgment of Acquit[t]al "only as to defendant Martinez's and defendant Bravo's conspiracy counts. The defendants' section 666 convictions are VACATED." (Docket 644.)

The next day, defendants filed a joint motion for acquittal reinstatement, arguing that the Court's judgment of acquittal on the section 666 counts was proper, should have ended the case, and is irreversible. (Docket 645.) Citing the First Circuit Court of Appeals' *Fernandez* opinion, they claim that "where a Court orders an acquittal[,] the decision cannot be reconsidered, regardless of the correctness of the district court's decision." *Id.* at 2 (internal punctuation and citation omitted). Double jeopardy, defendants contend, prohibits the Court from vacating the acquittal after it—either "rightly or wrongly"—entered it. They thus demand that the Court re-instate the initial acquittal. *Id.* at 3.

The Court flatly rejects defendants' unfounded contentions that "there is no legal authority whatsoever that authorizes a Court to vacate a prior order of acquittal" and that the Court had no power to correct the oversight contained in its order. (Docket at 645 at p. 5.) Courts of appeals have explicitly remanded cases to lower courts to amend errors contained in judgment orders. *See, e.g., United States v. Bailey*, 691 F.2d 1009, 1019 (11th Cir. 1982) (perceiving a typographical error in a district court's judgment order and remanding the case "to correct an apparent typographical error in the Judgment Order"). Federal Rule of Criminal Procedure 36 ("Rule 36") also explicitly provides that "[a]fter giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Fed. R. Crim. P 36. The First Circuit Court of Appeals has explained that Rule 36 "applies to straightforward clerical and technical errors." *United States v. Ranney*, 298 F.3d 74, 81 (1st Cir. 2002). Those errors are "merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *United States v. Guevremont*, 829 F.2d 423, 426 (3d Cir. 1987). Transcription errors are thus protected. *U.S. v. Becker*, 36 F.3d 708, 709 (7th Cir. 1994). Rule 36 is generally inapplicable to judicial errors and omissions of law, because it is not meant to provide an opening for litigation over the merits. *United States v. Fahm*, 13 F.3d 447, 454 n.8 (1st Cir. 1994). The Court's line order language deeming defendants' section 666 counts "acquitted" instead of "vacated," however, is an error of transcription, not an error of law. The Court clearly referenced the First Circuit Court of Appeals' mandate in its first line order and explicitly sought to

implement the mandate "in accordance with the Judgments of the Court of Appeals." (Docket 642.) Defendants' implication that the oversight somehow constitutes a conduction of "further proceedings" allowed on remand entirely misses the mark. As all parties and the Court were aware, the First Circuit Court of Appeals' opinion was unambiguously to result in the reversal of defendants' conspiracy charges, and the vacating—not acquittal—of their section 666 convictions. The very use of a line order, which contained no analysis and indicated the Court's mere intent to follow the First Circuit Court of Appeals' directives, exemplifies that the Court did not intend to *sua sponte* acquit defendants of the section 666 charges. Rule 36, therefore, allows the Court to have corrected its oversight in its order.

Defendants' argument that a court's dismissal of a charge is binding, regardless of whether it was "rightly or wrongly" decided, is also misplaced. The First Circuit Court of Appeals' "rightly or wrongly" language refers to the correctness of a district court's acquittal reached after engaging in factual assessments and/or legal determinations. *See Fernandez*, 722 F.3d at 36-37; *United States v. Pacheco*, 434 F.3d 106, 112-14 (1st Cir. 2006). Here, the Court did no such thing; it merely intended to transfer and apply the First Circuit Court of Appeals' mandate to the trial docket, not to issue an acquittal *sua sponte* without any kind of analysis. In no way should its error be construed as "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Fernandez*, 722 F.3d at 36; *Pacheco*, 434 F.3d at 112. The double jeopardy concepts cited by defendants, therefore, are not pertinent the issue before the Court.

In short, defendants are not entitled to a "reinstatement" of acquittal because the line order's section 666 acquittal language had no legal basis. The Court never intended to grant defendants acquittal—the order included a straightforward technical error "arising from oversight." *See* Fed. R. Crim. P. 36. Accordingly, defendants' joint motion is **DENIED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, November 8, 2013.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[Filed: 06/26/2013]

Nos. 12-1289, 12-1290

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN BRAVO FERNANDEZ;
HECTOR MARTÍNEZ MALDONADO,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, *U.S. District Judge*]

Before Howard, Lipez, and Thompson, *Circuit Judges.*

Martin G. Weinberg, with whom *David Z. Chesnoff*, *Chesnoff & Schonfeld*, *Kimberly Homan*, *Jose A. Pagan*, and *Pagan Law Offices* were on brief, for appellant Bravo Fernandez.

Abbe David Lowell, with whom *Christopher D. Man* and *Chadbourne & Parke LLP* were on brief, for appellant Martínez Maldonado.

Peter M. Koski, Deputy Chief, Criminal Division, Public Integrity Section, United States Department of Justice, with whom *Lanny A. Breuer*, Assistant Attorney General, and *Mary Patrice Brown*, Deputy Assistant Attorney General, were on brief, for appellee.

June 26, 2013

LIPEZ, *Circuit Judge*. This case presents multiple issues of substantial importance, including a question of first impression in this circuit on the interpretation of the federal program bribery statute, 18 U.S.C. § 666. Defendants are a Puerto Rico legislator and a Commonwealth businessman who were charged, inter alia, with unlawfully exchanging a trip to Las Vegas to attend a prize fight for favorable action on legislation. A jury returned guilty verdicts against both men, Juan Bravo Fernandez ("Bravo") and Hector Martínez Maldonado ("Martínez"), and they now challenge their convictions on numerous grounds. Foremost is their contention that the jury was allowed to convict on a gratuity theory which is beyond the scope of § 666.

Unlike most circuits to have addressed this issue, we conclude that § 666 does not criminalize gratuities. Because the district court's instructions permitted the jury to find guilt on the § 666 counts based on a gratuity theory, Defendants' convictions on that count must be vacated. In addition, we conclude that the Double Jeopardy Clause, though for reasons that differ for each Defendant, entitles both men to acquittal on their respective conspiracy charges.

I.

A. Factual Background

We briefly summarize the relevant facts, reserving for our analysis a more detailed discussion of the facts relevant to each issue presented on appeal. We view the facts in the light most favorable to the jury's verdicts. *See United States v. Ciresi*, 697 F.3d 19, 23 (1st Cir. 2012).

From January 2005 until early 2011, Martínez served in the Senate of the Commonwealth of Puerto Rico.[1] When Martínez became a senator he was assigned to the Public Safety Committee, where he served as chairman. Bravo was the president of Ranger American, a private firm that provides security services, including armored car transportation and security guard staffing.

In early 2005, Bravo advocated for the passage of legislation related to the security industry in Puerto Rico. One of these bills, Senate Project 410, addressed issues pertaining to security at shopping malls, while the other, Senate Project 471, involved licensing requirements for armored car companies. The government produced testimony at trial that the passage of these bills would have provided substantial financial benefits to Ranger American. As chairman of the Public Safety Committee, Martínez was in a position to exercise a measure of control over the introduction

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[1] The record does not specify the duration of Martínez's tenure in the Puerto Rico Senate. We take judicial notice of the fact that he resigned his seat in early 2011. *See* Fed. R. Evid. 201(b) (allowing a court to take judicial notice of a fact "not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

and progression of the bills through the Committee and the Senate.

On May 14, 2005, prominent Puerto Rican boxer Félix "Tito" Trinidad was scheduled to fight Ronald Lamont "Winky" Wright at the MGM Grand Hotel & Casino in Las Vegas, Nevada. On March 2, Bravo purchased four tickets to the fight at a cost of $1,000 per ticket. The same day, Martínez submitted Senate Project 410 for consideration by the Puerto Rico Senate. On April 20, Martínez presided over a Public Safety Committee hearing on Senate Project 471 at which Bravo testified. The next day, Bravo booked one room at the Mandalay Bay Hotel in Las Vegas. On May 11, Martínez issued a Committee report in support of Senate Project 471.

Bravo arranged for first-class airline tickets to Las Vegas for himself, Martínez, and another senator, Jorge de Castro Font.[2] In Las Vegas, the three men stayed in separate rooms at the Mandalay Bay for two nights. Bravo paid for Martínez's room the first night, and de Castro Font paid for Martínez's room the second night. The men, along with de Castro Font's assistant, went out to dinner the day before the fight, with Bravo footing the $495 bill. The men attended the Tito Trinidad fight the next night, using the $1,000 tickets Bravo had purchased.

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[2] In 2008, Jorge de Castro Font was indicted on numerous counts relating to corruption by an elected official. *See United States v. De Castro-Font*, 587 F Supp. 2d 353, 355 (D.P.R. 2008). On January 29, 2009, de Castro Font pled guilty to 21 counts of the indictment filed against him. He received a sentence of sixty months' imprisonment. *See United States v. De Castro-Font*, 08-CR-337-01(FAB), Doc. 353 (D.P.R. May 17, 2011).

The day after the fight, Bravo, Martínez, and de Castro Font flew from Las Vegas to Miami, where they spent the night in individual hotel rooms at the Marriott South Beach. The rooms were reserved and paid for by Bravo at a total cost of $954.75. The next day, on May 16, the three returned to Puerto Rico.

On May 17, de Castro Font, acting as Chair of the Committee on Rules and Calendars, scheduled an immediate vote on the floor of the Puerto Rico Senate for Senate Project 471. Both de Castro Font and Martínez voted in support of the bill. The next day, Martínez issued a Committee report in favor of Senate Project 410. On May 23, de Castro Font scheduled an immediate vote on the floor of the Senate for Senate Project 410. Again, both de Castro Font and Martínez voted for the bill.

B. Procedural Background

On June 22, 2010, a grand jury returned an indictment charging Bravo and Martínez with (1) violating 18 U.S.C. § 371 by conspiring to (a) commit federal program bribery, and (b) travel in interstate commerce in aid of racketeering; (2) violating 18 U.S.C. § 1952(a)(3)(A) by traveling in interstate commerce with the intent to "[p]romote, establish, carry on, and facilitate the promotion, establishment, and carrying on," of unlawful activity, specifically (a) federal program bribery in violation of § 666, and (b) bribery in violation of P.R. Laws Ann., tit. 33, §§ 4360 and 4363; and (3) federal program bribery in violation of § 666. Martínez was additionally indicted for obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

The case went to trial on February 14, 2011. On March 7, 2011, a jury convicted Bravo of conspiracy to travel in interstate commerce in aid of racketeering (count one), interstate travel in aid of racketeering with the intent to promote bribery in violation of Puerto Rico law (count two), and federal program bribery (count four). The jury found Martínez guilty of conspiracy (count one), but checked "No" as to each potential object of the conspiracy. He was also convicted of federal program bribery (count five). The jury acquitted Martínez of interstate travel in aid of racketeering (count three) and obstruction of justice (count six).

The trial court granted Bravo's motion for judgment of acquittal on count two, finding that the repeal of the Puerto Rico bribery laws before the trip took place made it impossible for Bravo to satisfy the "thereafter" element[3] of a Travel Act violation. It initially "dismissed" Martínez's conviction on count one because the jury rejected both potential objects of the conspiracy, but then "reinstated" the conviction the next day, and eventually dismissed it without prejudice. On March 1, 2012, the district court sentenced both defendants to 48 months of imprisonment. Bravo received a fine of $175,000 and Martínez a fine of $17,500.[4]

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[3] *See infra* Part V.

[4] Bravo and Martínez both filed motions for bail pending appeal before the district court, and both motions were denied. Martínez began serving his sentence on March 1, 2012, while Bravo began serving his on May 7, 2012. Bravo began serving his sentence later because of some health issues. Defendants subsequently brought their motions for bail pending appeal before us, and, in early March 2012, both were denied. Following oral argument in November 2013, we received Defendants'

C. Issues on Appeal

Both Defendants challenge their substantive § 666 convictions on numerous grounds. Martínez challenges on double jeopardy grounds the district court's decision to reinstate his conspiracy conviction and then dismiss it without prejudice. Bravo also challenges his conspiracy conviction, arguing, among other things, that the judgment of acquittal on the Travel Act count requires the entry of judgment of acquittal on the conspiracy count, as § 666, given the findings by the jury, cannot serve as an object of the conspiracy to violate the Travel Act.

II.

Defendants raise several challenges to the scope of the federal program bribery statute, 18 U.S.C. § 666, and, identifying certain elements of the statute, they also claim that the circumstances of this case do not satisfy any of those elements. We review the questions of law raised in their arguments de novo, *United States v. Place*, 693 F.3d 219, 227 (1st Cir. 2012); to the extent that their claims challenge the sufficiency of the government's evidence, we again employ de novo review, appraising the proof in the light most favorable to the verdict, *United States v. Rodríguez-Vélez*, 597 F.3d 32, 38 (1st Cir. 2010).

A. Agents

Section 666 requires the government to show that the individual receiving or soliciting the bribe was "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof." 18 U.S.C.

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renewed motions for bail pending appeal on December 11, 2012. They were granted on January 2, 2013.

§ 666(a)(1). The term "agent" is defined as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." *Id.* § 666(d)(1). Defendant Martínez maintains that he could not be convicted under § 666(a)(1)(B) because he was not an agent of the Commonwealth of Puerto Rico. Defendant Bravo argues that because neither Martínez nor de Castro Font were agents of the Commonwealth, he cannot be guilty of bribing them pursuant to § 666(a)(2).

1. The Scope of the Agency

At the outset, we reject any notion that state legislators are categorically exempt from prosecution under § 666. Indeed, the plain language of the statute includes a "representative" of a "government" in the list of positions that fall under the statute's definition of "agent," 18 U.S.C. § 666(d)(1), and there is no more classic government "representative" than a legislative branch officer. *See United States v. Lipscomb*, 299 F.3d 303, 333 (5th Cir. 2002) ("Congress clearly sought to apply § 666 to legislative-branch officials."); *United States v. Sunia*, 643 F Supp. 2d 51, 67 (D.D.C. 2009) (acknowledging that "a legislator who misuses his legislative authority to facilitate corrupt practices affecting agency programs that receive federal funds may well fall within the ambit of § 666").

Defendants' more nuanced argument is that the government failed to sufficiently specify the entity for which Martínez and de Castro Font were agents. They maintain that Martínez may only be appropriately classified as a representative (and thus an agent) of the Puerto Rico Senate, and not—as the indictment alleged—of the Commonwealth as a whole. This

distinction is significant, Defendants claim, because the Puerto Rico Senate itself had no connection with, or control over, the federal funds identified by the two government witnesses, and without such a connection the government cannot show that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). If the $10,000 threshold is not met, then the actions of the agents of the non-qualifying organization, government, or agency—or the actions of others with respect to those agents—cannot implicate § 666.

Once again we need go no further than the plain language of the statute to conclude that Martínez and de Castro Font may be properly considered "agents" of the Commonwealth of Puerto Rico. Among the five types of entities for which one may be an agent within the meaning of § 666 is a state government.[5] *See* 18 U.S.C. § 666(a)(1), (2) (referring to "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof"). The Puerto Rico Senate is a constituent part of the Commonwealth government, created by the Puerto Rico Constitution. *See* P.R. Const. art. III, § 1. Its members are thus part of the limited category of government officials who represent the "State" as a whole, unlike employees of localities or of agencies at every level of government. As such, they easily fall within the concept of "an agent of . . . a State . . . government." Martínez and de Castro

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[5] Under § 666, the definition of "State" includes "a State of the United States, the District of Columbia, and any *commonwealth*, territory, or possession of the United States." 18 U.S.C. § 666(d)(4) (emphasis added). Because "State" is a term of art in § 666, we shall refer to Martínez and de Castro Font as "State senators."

Font were thus properly considered agents of the Commonwealth of Puerto Rico under § 666.

At trial, the Associate Director for the Office of Budget and Management testified that during 2005—the year of the charged conduct—the Commonwealth received over $4.7 billion in federal funds. Because Martínez and de Castro Font are agents of the Commonwealth, the evidence was sufficient to show that they are agents of a "government . . . [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b).

2. Agent Control of Expenditures

Defendants argue that being an "agent" under § 666 must include an element beyond merely representing the entity. Framing their argument partially in constitutional terms, they assert that, to establish the requisite link to Congress's authority to legislate under the Necessary and Proper Clause, an "agent" under § 666 "must be 'authorized to act on behalf of [the entity] with respect to its funds.'" *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (quoting *United States v. Phillips*, 219 F.3d 404, 411 (5th Cir. 2000)); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004) (describing Congress's authority under the Necessary and Proper Clause). Defendants maintain that the government failed to adduce any evidence at trial establishing that either Martínez or de Castro Font, acting as senators, had the authority to control the expenditure of funds by any entity receiving federal funds, and that the senators therefore do not qualify as "agents" for purposes of § 666.

We disagree. Neither the statutory language nor constitutional principles lead to such a restricted understanding of the provision. As the Eleventh

Circuit recently noted when presented with this argument, "[n]owhere does the statutory text either mention or imply an additional qualifying requirement that the person be authorized to act *specifically with respect to the entity's funds*." *United States v. Keen*, 676 F.3d 981, 989-90 (11th Cir. 2012). The statute merely requires that the individual be "authorized to act on behalf of another person or government." 18 U.S.C. § 666(d)(1). In interpreting the text of a statute, "we will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity, or some other extraordinary consideration, such as the prospect of yielding a patently absurd result." *Pritzker v. Yari*, 42 F.3d 53, 67-68 (1st Cir. 1994) (citations omitted); *cf. Salinas v. United States*, 522 U.S. 52, 57-58 (1997). Defendants fail to show that any absurd result would follow from a reading loyal to the plain meaning of the statute.

The Supreme Court's and this circuit's § 666 jurisprudence support the conclusion that the statute incorporates no embellishment on the concept of "agent." Indeed, the Supreme Court has repeatedly rejected constructions of § 666 that would impose limits beyond those set out in the plain meaning of the statute. In *Salinas*, for example, the Court rejected a defendant's attempt to read into the statute an extra-textual requirement of proof that "the bribe in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates § 666(a)(1)(B)." 522 U.S. at 55-56. In reaching its conclusion, the Court pointed to the "enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered." *Id.* at 56. Seven years later, in *Sabri v. United States*, the Court rejected a similar argument that the statute requires proof of a "nexus" between a bribe or kickback and

some federal money. It noted that while "not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant," the absence of such links does not "portend[] . . . enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest." 541 U.S. at 605-06; *see also Fischer v. United States*, 529 U.S. 667, 677-79 (2000) (adopting broad reading of "benefits" under § 666(b) in light of statutory language "reveal[ing] Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs").

We previously addressed the scope of § 666(d)(1)'s definition of "agent" in *United States v. Sotomayor-Vázquez*, 249 F.3d 1 (1st Cir. 2001). Drawing largely from the Supreme Court's interpretation of the statute in Salinas, we held that "an expansive definition of 'agent' is necessary to fulfill the purpose of § 666, i.e., to protect the integrity of federal funds." *Id.* at 8. In support of this reading, we quoted at length from the dissent in *United States v. Phillips*:

> [T]he expansive statutory definition [in § 666(d)(1)] recognizes that an individual can affect agency funds despite a lack of power to authorize their direct disbursement. Therefore, to broadly protect the integrity of federal funds given to an agency, § 666 applies to any individual who represents the agency in any way, as representing or acting on behalf of an agency can affect its funds

> even if the action does not directly involve financial disbursement.

Id. at 8 (quoting Phillips, 219 F.3d at 422 n.3 (Garza, J., dissenting)). We thus held that "an outside consultant with significant managerial responsibility" could be an "agent" of a government entity. *Id.*

In keeping with our own precedent and that of the Supreme Court, we conclude that embracing an approach faithful to the plain language of § 666 is appropriate here. Even if the officials accepting bribes do not have the ability to control the expenditure of an entity's funds, "it cannot be denied that their fraudulent conduct poses a threat to the integrity of the entity, which in turn poses a threat to the federal funds entrusted to that entity." *Keen*, 676 F.3d at 990; *see also United States v. Hines*, 541 F.3d 833, 835-36 (8th Cir. 2008). Such conduct "raise[s] the risk [that] participating organizations will lack the resources requisite to provide the level and quality of care envisioned by the program." *Fischer*, 529 U.S. at 681-82; *cf. Sabri*, 541 U.S. at 606 ("Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."). Narrowing the scope of § 666(d)(1)'s definition of "agent" would be "inconsistent not only with the expansive, unqualified language that Congress has elected to use, but also with Congress' clear objective of ensuring the integrity of entities receiving substantial sums of federal funds." Keen, 676 F.3d at 991 (citation omitted) (internal quotation marks omitted). We therefore decline to do so.

These concerns about financial integrity also doom Defendants' constitutional argument. "[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular

federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010). In rejecting a different Necessary and Proper Clause challenge to § 666 in *Sabri*,[6] the Supreme Court wrote:

> Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.

541 U.S. at 605.

We have no hesitation in concluding that "measures to police the integrity of entities receiving federal funds fall under the scope of this power," *Keen*, 676 F.3d at 991, even absent evidence of an agent's authority to act specifically with respect to the covered entity's funds. "Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity." *Sabri*, 541 U.S. at 605. To accept that there can only be harmful effects of such dishonest conduct when the actor has authority to control the expenditure of the entity's funds would be naive; to

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[6] The defendant in *Sabri* argued that § 666 could not be constitutionally applied "because it fails to require proof of any connection between a bribe or kickback and some federal money." 541 U.S. at 604.

accept that the prohibition of such conduct by such individuals is not "rationally related" to Congress' implementation of its constitutionally enumerated powers would be an unduly restrictive application of that standard. The Supreme Court has stated that to fall within the scope of the federal interest, "[i]t is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided [in § 666]." *Id.* at 606. We see no basis for departing from that view here.

B. The Transactional Element

For a bribe to fall within the purview of § 666, it must be made "in connection with any business, transaction, or series of transactions of [the covered] organization, government, or agency involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B), (a)(2). This requirement has been referred to as the "transactional element" of § 666. *United States v. Robinson*, 663 F.3d 265, 270 (7th Cir. 2011). Defendants point out that a circuit split exists as to how the $5,000 threshold in the transactional element is met, but argue that under either approach the government's evidence was insufficient. Taking this opportunity to clarify the correct standard, we conclude that under the proper approach the evidence was sufficient to satisfy the $5,000 threshold and the transactional element generally.

1. Value of Bribe or Transaction?

In determining how to calculate the $5,000 requirement, some courts have suggested that a court should look to the value of the bribe actually offered or paid. *See United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009) (stating that "§ 666 contains . . . a requirement

that the illegal gift or bribe be worth over $5,000"); *United States v. Spano*, 401 F.3d 837, 839 (7th Cir. 2005) ("[T]o establish a case under § 666, the government need only prove that an agent . . . was offered or accepted a bribe worth $5000 or more . . ."); *United States v. LaRue*, 170 F.3d 1026, 1028 (10th Cir. 1999) (stating that § 666 "prohibits the unlawful acceptance of anything of value of $5,000 or more"). Other courts, however, have held that the $5,000 requirement "refers to the value of the 'business, transaction, or series of transactions,' not the value of the bribe." *United States v. McNair*, 605 F.3d 1152, 1185 n.38 (11th Cir. 2010); *see also United States v. Duvall*, 846 F.2d 966, 976 (5th Cir. 1988) ("[I]t is clear that the $5000 figure qualifies the transactions or series of transactions that the recipient of the bribe carries out in exchange for receiving 'anything of value.'").

In our view, the statutory language is unambiguous and plainly requires the latter reading. Applied to the present case, § 666(a)(1)(B) prohibits a government agent from accepting or agreeing to accept "*anything of value*" from another individual "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of that government "involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B) (emphasis added). Section 666(a)(2) prohibits offering, giving, or agreeing to give "*anything of value*" to an individual with the "intent to influence or reward" a government agent "in connection with any business, transaction, or series of transactions" of that government "involving anything of value of $5,000 or more." *Id.* § 666(a)(2) (emphasis added). The thing accepted or agreed to be accepted in § 666(a)(1)(B)—and the thing given or offered in § 666(a)(2)—is the bribe. Thus, the bribe can be

"anything of value"—it need not be worth $5,000. The $5,000 element instead refers to the value of the "business" or "transaction" sought to be influenced by the bribe. "In other words, the subject matter of the bribe must be valued at $5,000 or more; the bribe itself need only be 'anything of value.'" *Robinson*, 663 F.3d at 271.

We note, however, that the value of the bribe may be relevant in determining the value of the bribe's objective. In *United States v. Marmolejo*, 89 F.3d 1185 (5th Cir. 1996), for example, the court looked to the value of bribes where the subject matter of the bribes consisted of "intangible items." The defendants in *Marmolejo* were two local law enforcement officers who had agreed to permit conjugal visits between an inmate and his wife (and his girlfriend) in exchange for a monthly payment of $6,000 and $1,000 per conjugal visit. *Id.* at 1191. The court noted that "[t]he transactions involved something of value—conjugal visits that [the prisoner] was willing to pay for," *id.* at 1193—and it looked to "traditional valuation methods" to estimate that value, *id.* at 1194. The court concluded that the prisoner's willingness to pay $6,000 per month plus $1,000 per visit set the market value for the conjugal visits, and it thus found that the transactions between the prisoner and the two defendants "involved something of value of $5,000 or more." *Id.* at 1194 (internal quotation marks omitted).

Hence, where the subject matter of the bribe is a "thing of value" without a fixed price, courts may look to the value of the bribe as evidence of the value of the "business, transaction, or series of transactions." That collateral use does not alter the proposition that the bribe itself need only consist of "anything of value."

2. "Business or transaction" requirement

Defendants maintain that the enactment of Senate Projects 410 and 471 should not be considered to be "in connection with any business, transaction, or series of transactions . . . involving anything of value of $5,000 or more" under § 666. They offer several justifications for this position. We find none of them persuasive.

First, Defendants focus on the "in connection with" language. Their attack is anchored in a Fifth Circuit case, *United States v. Whitfield*, which involved two state judges who were convicted of accepting bribes from an attorney in exchange for favorable rulings in his cases. 590 F.3d at 335. The government argued, and the court assumed, that the judges were "agents" of the Administrative Office of the Courts ("AOC"), a Mississippi state agency that received over $10,000 in federal funds and was "charged with assist[ing] in the efficient administration of the *nonjudicial* business of the courts of the state." *Id.* at 344 (emphasis added) (citation omitted) (internal quotation marks omitted). The court held, however, that the judges' rulings were not made "in connection with" the business or transactions of the AOC, as they were made while the judges were performing purely *judicial* duties. *Id.* at 346-47. Here, Defendants maintain that the federal funds identified by the government went to the Puerto Rico Departments of Education and Treasury, and because there is no nexus between the Departments of Education and Treasury and the act of legislating Senate Projects 410 and 471 in the Puerto Rico Senate, the legislation was not "in connection with" the business or transactions of the federally funded entity.

Whatever the merits of *Whitfield*'s "nexus" requirement, they are not implicated in this case, as we have determined that Martínez and de Castro Font were agents of the Commonwealth of Puerto Rico, which receives federal funds. When the judges in *Whitfield* were acting in their capacity as judicial decisionmakers, they were not acting within their scope as agents of the AOC, as the AOC was specifically limited to the nonjudicial business of the courts. By contrast, when Martínez and de Castro Font were acting in their capacity as legislators, they were performing the precise functions that members of a state legislative body perform as agents of a state government. The legislative acts that constituted the subject of the bribes had a direct "connection with the business, transaction, or series of transactions" of the Commonwealth of Puerto Rico.

Second, Defendants argue that the passing of Senate legislation cannot be considered "business" or a "transaction" under § 666. The thrust of their argument is that the terms "business" and "transaction" should be construed narrowly to encompass only commercial conduct, and "the Senate does not conduct business or financial transactions through legislating."

In *Salinas*, the Supreme Court rejected a defendant's similar attempt to impose a narrowing construction on § 666. 522 U.S. at 57 There, the defendant argued that federal funds must be affected to violate § 666(a)(1)(B). *Id.* at 56. Looking to the language of the statute, the Court concluded that the word "any," which precedes the business or transaction clause, undercuts the attempt to impose the defendant's narrow interpretation. *Id.* at 56-57. The Court's emphasis on the expansive language in

§ 666(a)(1)(B) in *Salinas* suggests that the courts should avoid imposing narrowing constructions on that language. Furthermore, such a reading would foreclose large swaths of government activity that, though technically "non-commercial," could be profitable for unscrupulous individuals to attempt to influence. This narrow construction would be contrary to Congress's intent. *See id.* at 56 (citing § 666's "expansive, unqualified language, both as to the bribes forbidden and the entities covered," as evidence of legislative intent to construe statute broadly). Recently confronting this argument, the Seventh Circuit stated:

> The "business" of a federally funded "organization, government, or agency" is not commonly "business" in the commercial sense of the word. An interpretation that narrowly limits the scope of the transactional element to business or transactions that are commercial in nature would have the effect of excluding bribes paid to influence agents of state and local governments. This contradicts the express statutory text.

Robinson, 663 F.3d at 274; *see also Marmolejo*, 89 F.3d at 1191-92. We agree, and hold that the business or transaction clause in § 666 does not limit the statute's reach to purely commercial conduct.

Third, Defendants focus on the word "involving,"[7] and posit that in order to satisfy § 666, the profit that

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[7] *See* 18 U.S.C. § 666(a)(1)(B) (prohibiting an agent from, inter alia, accepting or agreeing to accept anything of value "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization,

Ranger American would stand to gain from the passage of the Senate Projects would "have to have been a part of or a necessary consequence of the legislation or have been included in its scope to satisfy the $5,000 requirement." Because the legislation itself was "revenue-neutral" and gave nothing directly to Ranger American, Defendants maintain that neither of the Senate Projects "involved" prospective revenues for Ranger American (and, by extension, Bravo).

We find no support in the case law or the statutory language for this unnecessarily restrictive interpretation of § 666. Even if legislation is revenue-neutral on its face, it is sufficient if the direct and foreseeable effect of that legislation would be to give the individual offering the bribe a particular desired result—assuming, of course, that the transaction involved something of value of $5,000 or more. Here, the government presented evidence that the foreseeable effect of the passage of Senate Project 471 would be a change in the armored car service industry, which in turn would result in financial benefits to Ranger American and Bravo far exceeding $5,000. This impact is sufficient to satisfy the "involving" requirement of § 666.[8]

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government, or agency *involving* anything of value of $5,000 or more") (emphasis added).

[8] For the reasons discussed above, we also reject Defendants' claim that it would somehow violate the Due Process Clause to apply § 666 to state senators who receive bribes in connection with legislation pending before them. Such prosecutions fall squarely within the plain terms of § 666. *See United States v. Councilman*, 418 F.3d 67, 84-85 (1st Cir. 2005) (rejecting defendant's argument that court engaged in "unforeseeably expansive interpretation" of criminal statute, as acts alleged constitute "'conduct that the statute . has fairly disclosed to

3. Sufficiency of the Evidence

With the appropriate understanding of the statute in mind, we can easily reject Defendants' sufficiency challenge as to the $5,000 requirement. Miguel Portilla, the president of Capitol Security—a company with which Ranger American competed—testified that Senate Project 471, which sought to amend Law 108,[9] would have forced Ranger American's only competitors in the armored car protection business to close down, thereby ensuring that Ranger American would have an effective monopoly on that sector of the security industry in Puerto Rico. Nestor Medina, the former general manager of Loomis Puerto Rico—a subsidiary of Loomis U.S., an armored car service—testified that Loomis controlled roughly 35% of the armored car service industry, Ranger American 52%, and Brinks the remainder. Medina stated that Loomis Puerto Rico netted $1.5 million in profits in 2005, and that there would therefore be an extra $1.5 million in additional profits available for other armored car companies to capture if Loomis were to leave the market.[10] Because, according to Portilla's testimony,

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be within its scope.'" (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997))).

[9] Portilla testified that Law 108 regulates the licensing of security agencies in Puerto Rico.

[10] Defendants take issue with certain of the district court's evidentiary rulings as to Medina's testimony. These arguments do not affect our sufficiency analysis for two reasons. First, Defendants would have suffered no prejudice by this testimony. Portilla's testimony—which is not challenged by Defendants—alone provides sufficient evidence on this issue. Any error with respect to the admission of Medina's testimony would therefore be harmless. Second, reviewing the district court's evidentiary rulings under the proper standard, *see United States v. Appolon*, 695 F.3d 44, 60 (1st Cir. 2012), we cannot say that the district

Ranger American would have been the only company left in that market, it is reasonable to conclude that Bravo's company would stand to capture a substantial portion of that profit. This testimony provided sufficient evidence for a reasonable jury to conclude that Senate Project 471 was worth $5,000 or more to Bravo.

III.

Defendants challenge the district court's jury instructions as to the § 666 counts on several grounds. We need reach only Defendants' contention that the court's instructions, reinforced by the government's closing argument, permitted the jury to find them guilty of offering and receiving a gratuity, rather than a bribe. This claim necessarily encompasses the argument that § 666 does not in fact criminalize gratuities, a question of first impression in this circuit and an issue that has generated considerable debate in the courts and among commentators.

"We review de novo preserved claims of legal error in jury instructions, but we review for abuse of discretion claimed errors in instructions' form or wording." *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 434 (1st Cir. 2010). In our review, "we look to the challenged instructions in relation to the charge as a whole, asking whether the charge in its entirety—and in the context of the evidence—presented the relevant issues to the jury fairly and adequately." *Drumgold v. Callahan*, 707 F.3d 28, 53 (1st Cir. 2013) (quoting *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487,

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court abused its discretion in permitting Medina to testify on redirect about his views regarding Senate Project 471 and its potential impact on Loomis, nor in its decision denying recross of Medina.

503 (1st Cir. 2011)) (internal quotation marks omitted).

Even if we find that a court's instructions were erroneous, we will vacate only if we determine that the error was prejudicial "based on a review of the record as a whole." *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 72 (1st Cir. 2009).

We begin by reviewing the instructions. Because we agree that they allowed a gratuities theory of guilt, we then consider the scope of § 666.

A. The Instructions

1. Background

Three of the district court's thirty-six jury instructions are relevant here. The first is Jury Instruction 20, titled "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)." This instruction concerns Defendant Bravo. It explains that

> Defendant Bravo is accused of corruptly giving, offering, or agreeing to give things of value to defendant Martínez and/or Jorge de Castro-Font, with intent to influence or reward defendant Martínez and/or de Castro-Font in connection with a business, transaction, or series of transactions of the Commonwealth of Puerto Rico government involving more than $5,000.

Much of the language that follows this introduction tracks the language of the statute and is not problematic. For instance, paragraphs two through four of Jury Instruction 20 state the following:

> For you to find defendant Bravo guilty of bribery, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:
>
> First, that defendant Bravo gave, offered, or agreed to give any thing of value to any person;
>
> Second, that defendant Bravo did so corruptly with the intent to influence or reward an agent of the Puerto Rico government in connection with any business, transaction, or series of transactions of the Puerto Rico government . . . .

This same type of statute-tracking language is found in the second relevant instruction, Jury Instruction 21, titled "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(1)(B)." This instruction concerns the § 666 charges against Defendant Martínez. Paragraphs two through five state:

> For you to find defendant Martínez guilty of bribery, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt:
>
> First, that defendant Martínez was an agent of the Commonwealth of Puerto Rico government whose duties included those of an elected Senator of the Commonwealth of Puerto Rico, as charged;
>
> Second, that defendant Martínez solicited, demanded, accepted or agreed to accept any thing of value from another person;

> Third, that defendant Martínez did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the Puerto Rico government . . . .

However, certain parts of these two instructions include language that does not track the statute. Among these are paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21. Paragraph ten states:

> When considering the First and Second elements above, I instruct you that a defendant is not required to have given, offered, or agreed to give a thing of value before the business, transaction, or series of transactions. Rather, the Government may prove that defendant Bravo gave, offered, or agreed to give the thing of value before, *after*, or at the same time as the business, transaction, or series of transactions. Therefore, the government does not need to prove that defendant Bravo gave, offered, or agreed to offer the trip to Las Vegas *before* defendant Martínez performed any official action or series of acts.

(Emphases added.) Paragraph eleven of Jury Instruction 21 appears to have a purpose similar to that of paragraph ten of Jury Instruction 20, though paragraph eleven is concerned with the timing of Defendant Martínez's solicitation, demand, acceptance, or agreement to accept the thing of value:

> When considering the Second and Third elements above, I instruct you that a defendant is not required to have accepted or

> received a thing of value before the business, transaction, or series of transactions. Rather, the Government may prove that defendant Martínez solicited, demanded, accepted, or agreed to accept the thing of value before, *after*, or at the same time as the business, transaction, or series of transactions. Therefore, the Government does not need to prove that defendant Martínez solicited, demanded, accepted or agreed to accept the trip to Las Vegas *before* defendant Martínez performed any official act or series of acts.

(Emphases added.)

The final relevant instruction is Jury Instruction 22, titled simply "Bribery." This instruction states in full:

> I have used the word "bribery" in these instructions. Bribery requires that the government prove beyond a reasonable doubt the existence of a *quid pro quo* or, in plain English, an agreement that the thing of value that is given to the public official is in exchange for that public official promising to perform official acts for the giver. It is not sufficient that the thing of value is made to curry favor because of the official's position or that there is some connection in time or place with an official act that is promised to the giver; rather there must be an agreement that the thing of value was offered by defendant Bravo and accepted by Senator Martínez in exchange for a promise to perform an official act.

Defendants maintain that the district court's directions in Jury Instructions 20 and 21 allowed the jury to convict Martínez and Bravo of a gratuity offense. They argue that a permissible construction of Jury Instruction 20 could read as follows:

> [T]he Government may prove that defendant Bravo . . . offered . . the thing of value . . *after* . . . the business, transaction, or series of transactions. Therefore, the government does not need to prove that defendant Bravo . . . offered . . . the trip to Las Vegas *before* defendant Martínez performed any official action or series of acts.

Similarly, Jury Instruction 21 could be read to state:

> [T]he Government may prove that defendant Martínez . . . agreed to accept the thing of value . . *after* . . the business, transaction, or series of transactions. Therefore, the Government does not need to prove that defendant Martínez . agreed to accept the trip to Las Vegas *before* defendant Martínez performed any official act or series of acts.

Defendants argue that if Bravo had not offered Martínez anything before Martínez performed an official act, and Martínez had therefore not accepted (or even agreed to accept) anything from Bravo before performing that act, any subsequent offer of a thing of value from Bravo to Martínez cannot be construed as a bribe. Instead, the offer would merely be an offer of a reward for an act taken by Martínez in the past. This, Defendants maintain, is an offer of a gratuity, not a bribe.

The government does not explicitly address this potentially problematic construction of paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21. It argues that the titles of those instructions—"Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(2)" and "Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a)(1)(B)"—make clear that the jury must find bribery, not a mere gratuity. Additionally, the government points to the unambiguous quid pro quo language of Jury Instruction 22, which, it claims, leaves no doubt that the jury was required to find bribery to convict Defendants of violating § 666.

Relatedly, Defendants maintain that the effect of the alleged errors in Jury Instructions 20 and 21 was magnified by certain statements made by the government during its closing argument. Defendants point to the government's statement to the jury that

> it doesn't matter when it was offered or when it was accepted . . . . These instructions clarify that—that it doesn't matter if the trip was offered before official acts were taken, at the same time official acts were taken, *or after official acts were taken*, because the crime is offering or accepting the trip with intent to influence or reward.

(Emphasis added.) This language, Defendants posit, suggests that the government need only prove a "connection" between the official acts and the offer of the Las Vegas trip, rather than a causal relationship. Defendants argue that the government essentially told the jurors that they could convict Martínez and Bravo of violating § 666 if they found that a mere gratuity—as opposed to a bribe—was offered by Bravo and accepted by Martínez.

2. Analysis

The Supreme Court explained the distinction between bribes and illegal gratuities in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999):

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), *or for a past act that he has already taken*.

Id. at 404-05 (third emphasis added) (construing the general federal bribery and gratuity statute, 18 U.S.C. § 201); *see also United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (noting in a § 666 case that "[t]he essential difference between a bribe and an illegal gratuity is the intention of the bribe-giver to effect a *quid pro quo*"). As the Eighth Circuit has noted, "[t]he core difference between a bribe and a gratuity is not the time the illegal payment is made, but the *quid pro quo*, or the agreement to exchange [a thing of value] for official action." *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998). Although the timing of the payment may not provide a conclusive answer as to whether that *payment* is a bribe or a gratuity, the timing of the *agreement to make or receive a payment* may: one cannot agree to

perform an act in exchange for payment when that act has already been performed. Therefore, if the agreement to exchange a thing of value for an act is made after that act has been performed, that agreement cannot be properly viewed as an agreement to offer or accept a bribe.

With this distinction in mind, it is clear that paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21 told the jury that Bravo could be convicted under § 666 for agreeing to give Martínez a gratuity, and that Martínez could be convicted under § 666 for agreeing to accept the same. Paragraph ten explains that for a conviction under § 666, the government need not prove that Bravo offered or agreed to give Martínez anything of value before the transaction that was the subject of the "payment" took place, and that it is sufficient for conviction to show that Bravo "offered, or agreed to give the thing of value . *after* the . . transaction." Similarly, paragraph eleven suggests that the government need not prove that Martínez accepted or agreed to accept the thing of value before he performed the act that was the subject of the "payment," and that it is sufficient to show that Martínez "agreed to accept the thing of value . . . *after* . . . the transaction."

This view of the requirements of § 666 was reinforced by the government's closing argument. Like the court's jury instructions, significant portions of the government's closing argument were consistent with a bribery theory under § 666. However, in emphasizing that "it doesn't matter if the trip was offered . . . after official acts were taken," the government invited the jury to find guilt based on a gratuity theory of liability.

While the language in Jury Instruction 22 correctly states the requirements for a bribery conviction, it was not sufficient to offset the flatly contrary language in Jury Instructions 20 and 21. This is particularly so because the gratuities theory was offered in the instructions on the § 666 counts themselves, whereas the correct bribery language was in a subsequent global instruction that applied to both the Puerto Rico and federal bribery counts.

Importantly, the evidence presented at trial could support a finding that the "payment" Bravo gave and Martínez received constituted a gratuity. The evidence showed that Martínez supported the Senate Projects *after* the Las Vegas trip—he voted in support of both bills within a week of returning—which is consistent with a quid pro quo, and therefore with a bribery theory. However, he *first* took actions in support of Senate Projects 410 and 471—such as submitting the bills to the Senate—weeks or months *before* the trip to Las Vegas, which is consistent with a gratuity theory. Hence, the jury reasonably could have found that the trip was a reward for that prior conduct, rather than the quid pro quo for Martínez's later support of the bills.

Although the instructions allowed the jury to convict Bravo and Martínez of violating § 666 by giving or accepting gratuities, there remains the more difficult question of whether this instruction was legally erroneous. We have never decided whether § 666 criminalizes gratuities in addition to bribes, as the issue has never been squarely before us. We now turn to that question.

B. Section 666

1. Statutory Context

We ordinarily begin with the plain language of a statute in assessing its meaning. *See United States v. Lachman*, 387 F.3d 42, 50 (1st Cir. 2004). Here, however, much of the relevant language originates in another provision, 18 U.S.C. § 201, and it is therefore useful to take a step back and place § 666 into statutory context before looking at its specific language.

Section 666 "was born as the stepchild of another statute, 18 U.S.C. § 201." Justin Weitz, Note, *The Devil is in the Details: 18 U.S.C. § 666 after Skilling v. United States*, 14 N.Y.U. J. Legis. & Pub. Pol'y 805, 816 (2011). Section 201 criminalizes bribes and gratuities on the part of federal officials. The statute separates the crimes of illegal bribes and illegal gratuities into two sections: § 201(b) outlaws the offering of bribes to public officials, as well as the acceptance of bribes by those officials, while § 201(c) outlaws the offering and acceptance of illegal gratuities. 18 U.S.C. § 201(b), (c).

The scope of § 201 is limited to those "acting for or on behalf of the United States." As the Senate Report for § 666 noted:

> With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the federal government may be considered as a "public official" under the definition in 18 U.S.C. 201(a) as anyone "acting for or on behalf of the United States, or any

> department, agency or branch of government thereof, including the District of Columbia, in any official function." The courts of appeals have divided on the question whether a person employed by a private organization receiving Federal monies pursuant to a program is a "public official" for purposes of section 201.

S. Rep. No. 98-225, at 369 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. Spurred by the Supreme Court's pending consideration of the meaning of § 201 in *Dixson v. United States*, 465 U.S. 482 (1984), which sought to resolve whether § 201 applied to state and local officials, Congress created § 666 as part of the Comprehensive Crime Control Act of 1984 ("CCCA"), Pub. L. No. 98-473, 98 Stat. 1837 (1984). According to the Senate Report, the purpose of § 666 was to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program."[11] S. Rep. No. 98-225 at 369; 1984 U.S.C.C.A.N. at 3510. Significantly, the Senate Report stated that § 666 was to be interpreted "consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by *bribery*." S. Rep. No. 98-225 at 370; 1984 U.S.C.C.A.N. at 3511 (emphasis added).

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[11] Section 666 has a separate provision that covers theft and fraud. *See* 18 U.S.C. § 666(a)(1)(A). That provision is not implicated in this case.

As originally enacted as part of the CCCA, the 1984 version of § 666 differed somewhat from the current law. For instance, what is now § 666(a)(2) was originally § 666(c), which read in relevant part:

> (c) Whoever offers, gives or agrees to give an agent of an organization or of a State or local government agency . anything of value *for or because of* the recipient's conduct in any transaction or matter or any series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned not more than ten years or fined not more than $100,000 . . .

18 U.S.C. § 666(c) (1984) (emphasis added). Section 666 was amended in 1986 as part of the Criminal Law and Procedure Technical Amendments Act of 1986 ("CLPTA"), Pub. L. No. 99-646, 100 Stat. 3592 (1986). The House Report noted that "the enactment of the CCCA came during the final weeks of the 98th Congress, and, due to demanding time constraints, the CCCA contained a number of ambiguities and technical defects." H.R. Rep. No. 99-797, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138. The purpose of the CLPTA was "to eliminate these technical defects and to make minor substantive revisions." *Id.* With respect to § 666 specifically, the House Report clarified that section 42 of the CLPTA amended the statute "to avoid its possible application to acceptable commercial and business practices." *Id.* at 30. The Report explained further:

> 18 U.S.C. 666 prohibits *bribery* of certain public officials, but does not seek to constrain lawful commercial business transactions. Thus, 18 U.S.C. 666 prohibits corruptly

> giving or receiving anything of value for the purpose of influencing or being influenced in connection with any business, transaction, or series of transactions. The provision parallels the bank bribery provision (18 U.S.C. 215).

Id. at 30 n.9 (emphasis added).

Two changes to § 666 effected by the CLPTA are noteworthy. First, the "for or because of" language was replaced with "intending to be influenced or rewarded" in § 666(a)(1)(B) (the provision applicable to agents) and "with intent to influence or reward" in § 666(a)(2) (the provision applicable to the individual offering the agent something of value). This change is especially notable, as the pre-amendment language was similar to that found in 18 U.S.C. § 201(c)—§ 201's *gratuity* provision. Section 201(c)(1)(A) prohibits one from "giv[ing], offer[ing], or promis[ing] anything of value to any public official . . . *for or because of* any official act performed or to be performed by such public official," 18 U.S.C. § 201(c)(1)(A), and the complementary subsection prohibits public officials from "demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value . . . *for or because of* any official act," *id.* § 201(c)(1)(B). Section 666's post-amendments language is much closer to that found in 18 U.S.C. § 201(b)—§ 201's *bribery* provision. It imposes punishment on one who gives or offers anything of value to a public official "with intent . . to influence" an official act, *id.* § 201(b)(1)(A), and on a public official who agrees to accept a thing of value "in return for . . being influenced in the performance of any official act," *id.* § 201(b)(2)(A). As the Supreme Court noted in *Sun-Diamond*, § 201(b)'s intent language implies that "for bribery there must be a *quid pro quo*—a specific intent to give or receive

something of value *in exchange* for an official act." 526 U.S. at 404-05.

The second relevant alteration is the addition of the word "corruptly" to the beginning of § 666(a)(1)(B) and (a)(2). Congress neither explained the reason for this change nor defined the term. However, this is another instance where the language of § 666 was amended in a way that brought the statute closer to § 201's bribery provision. Section 201(b)(1) punishes one who "*corruptly* gives, offers or promises anything of value to any public official," *id.* § 201(b)(1) (emphasis added), and punishes a public official who "*corruptly* demands, seeks, receives, accepts, or agrees to receive or accept anything of value," *id.* § 201(b)(2) (emphasis added). The word "corruptly" does not appear in § 201(c), the gratuities provision.

With this background in mind, we now analyze the text and structure of the statute.

2. The Meaning of § 666

The text of § 666 has remained largely unchanged since the 1986 amendments. Today, the statute reads in relevant part:

(a) Whoever . . . —

> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or

> series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666(a). One of the most conspicuous differences the texts of § 666 and § 201 concerns the intent element: while § 666 prohibits one from corruptly offering a thing of value with intent to "influence *or reward*" an agent, and prohibits an agent from corruptly soliciting or demanding a thing of value with intent to be "influenced *or rewarded*," the bribery provision applicable to federal officials, § 201(b), does not include the alternative "reward": it prohibits one from corruptly offering a thing of value with intent to "influence" an act, and prohibits an official from corruptly soliciting a thing of value with an intent to be "influenced." The word "reward" in § 666 is open to (at least) two different interpretations.[12]

Under the first interpretation, when a payor intends to *influence* an official's future actions, the payment constitutes a bribe; when a payor intends to *reward* the official's past conduct (or future conduct the official

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[12] Unfortunately, the legislative history contains no clues about why this word was added in the 1986 amendments.

is already committed to taking), the payment constitutes a gratuity. *United States v. Anderson*, 517 F.3d 953, 961 (7th Cir. 2008). Several circuits have adopted this reading of the language. *Id.*; *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007) ("[A] payment made to 'influence' connotes bribery, whereas a payment made to 'reward' connotes an illegal gratuity."); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007) (citing § 666(a)(1)(B)'s "influenced or rewarded" language in support of finding that "Section 666(a)(1)(B) prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action"); *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997).

Under the second interpretation, the word "reward" does not create a separate gratuity offense in § 666, but rather serves a more modest purpose: it merely clarifies "that a bribe can be promised before, but paid after, the official's action on the payor's behalf." *United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998). "This definition accords with the traditional meaning of the term 'reward' as something offered to induce another to act favorably on one's behalf (for example, a bounty offered for the capture of a fugitive)." *Id.* Under this reading, the terms "influence" and "reward" each retain independent meaning. "Influence" would be used in situations in which, for instance, a payment was made to a local government commissioner in order to induce him to vote in a certain way on a particular matter. "Reward" would be used if a *promise* of payment was made, contingent upon that commissioner's vote; once the commissioner voted in the way the payor requested, a "reward" would follow. Both of these situations involve a quid pro quo, and both therefore constitute bribes.

What matters, of course, is that the *offer* of payment precedes the official act.

Moreover, a reading consistent with the second interpretation would help to explain the presence of the "corruptly" language in § 666(a)(1)(B) and (a)(2). As discussed *supra*, § 201 uses the word corruptly *only* in its bribery provision, § 201(b), not in the gratuity provision, § 201(c). The Fourth Circuit puzzled over this issue in *United States v. Jennings*, "namely, why § 666(a)(2)'s language prohibiting 'rewards' given 'corruptly' should be interpreted to cover gratuities, when under § 201 *any* payment made 'corruptly' is a bribe, not an illegal gratuity." *Id.* (emphasis added). If the inclusion of the word "reward" in § 666 does no more than clarify that the *payment* of a bribe can occur after the act that is the subject of the bribe is completed (so long as the *agreement* to pay the bribe for the act or acts is made before the act or acts takes place), the statute still applies only to bribery, and the use of the word "corruptly" in § 666 would comport with the use of the same word in § 201(b): any payment made "corruptly" is a bribe.[13] *Cf. Anderson*, 517 F.3d

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[13] The Second Circuit took a different view of "corruptly," in keeping with its prior conclusion that § 666 covers gratuities. In *United States v. Bahel*, the Second Circuit rejected the defendant's argument that the jury charge should have specified that the government needed to prove that he "'had been "corrupted" *at the time he acted* in his official business.'" 662 F.3d 610, 638 (2d Cir. 2011) (emphasis added). Instead, the court concluded that "in the case of a gratuity, the corrupt intent required under Section 666 refers to an individual's state of mind *at the time the payment is received*." *Id.* (emphasis added). This interpretation of "corruptly" is at odds with that of the Fourth Circuit in *Jennings*, which would appear to require the corrupt intent at the time the agent engages in the act that is the subject of the reward. While *Bahel*'s definition of "corruptly" supports the Second Circuit's interpretation of § 666 as criminalizing

at 961 ("Unlike a gratuity, a bribe is a payment made with 'a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official action.'" (quoting U.S.S.G. § 2C1.1 cmt. background)).

Another critical difference between § 666 and § 201 is the maximum penalty authorized under the statutes. One who violates § 201(b), the bribery provision, may be fined, "or *imprisoned for not more than fifteen years*, or both." 18 U.S.C. § 201(b) (emphasis added). For a violation—*any* violation—of § 666, the statute provides a punishment of a fine, a term of imprisonment of "*not more than 10 years*," or both. *Id.* § 666(a) (emphasis added). An even more striking difference in penalties, however, exists between § 666 and § 201's gratuity subsection, the latter of which calls for a term of imprisonment of "*not more than two years*," *id.* § 201(c) (emphasis added)—meaning that § 666 authorizes a term of imprisonment *five times* longer than that allowed by § 201's gratuities provision.

This dramatic discrepancy in maximum penalties between § 666 and § 201(c) makes it difficult to accept that the statutes target the same type of crime—illegal

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gratuities as well as bribes, the question raised in *Jennings* remains: if "corruptly" in fact means nothing more than a lack of an innocent motive at the time one receives payment, why does § 201—the statute upon which § 666 is based—fail to include that language in its gratuity provision when it is included in § 201's bribery provision? In other words, although the Second Circuit provides an avenue by which the word "corruptly" could be given independent meaning without cabining § 666 to bribery, that interpretation would seem to vitiate the independent meaning of the same word in § 201—again, an important consideration given that § 666 was based on § 201.

gratuities. The difference in sentences contemplated by § 201(b) and § 666 is both less dramatic and more understandable: § 201(b) targets (primarily) federal officials, while § 666 targets non-federal officials who happen to have a connection to federal funds. It is reasonable to assume that the federal government viewed corrupt federal officials involved in the receipt of bribes as more culpable.[14]

The distinct penalties for bribes and gratuities contained in § 201 highlights an obvious yet important structural difference between §§ 666 and 201: § 666 does not have separate bribery and gratuity subsections. For those circuits that have found that § 666 criminalizes gratuities, two subsections of § 666 do the same work as four subsections of § 201. We think it unlikely that Congress would condense two distinct offenses into the same subsection in § 666 when the statute upon which it is based has separate subsections for each offense. *See* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 310 (1998) ("Congress did not . . . enact a mirror image of § 201 for nonfederal officials. Section 201 contains separate subsections to deal with bribery and gratuities. Section 666 does not. It is a mistake to attempt to read the two statutes as equal in reach."). Furthermore, if Congress did choose to condense bribes and gratuities into a single provision in § 666, it would be odd to do so by merely plugging slightly modified language from § 201(b), its bribery provision, into the statute. Surely the word "gratuity"—which is,

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[14] The legislative history of § 666 sheds no light on the reason for these differences in penalties.

of course, mentioned nowhere in the text or legislative history of § 666—was not foreign to Congress in 1986.

Although § 666 was enacted to supplement § 201, we can easily hypothesize at least two reasons why Congress may have chosen to supplement only § 201's prohibition of bribery. First, bribes are simply worse than illegal gratuities. *See Sun-Diamond*, 526 U.S. at 405 (noting the difference in the maximum sentences allowed under § 201(b) and (c) and stating that "[t]he punishments prescribed for the two offenses reflect their relative seriousness"); Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 Va. L. Rev. 1617, 1622 (1992) ("The typical one- to two-year penalty under gratuities statutes evidences the lesser degree of culpability in accepting a gratuity as opposed to a bribe."). Under this theory, Congress may have viewed bribery as far more of a threat to the proper functioning of federally funded programs than gratuities. Because the application of § 666 to gratuities offenses would "take[] the statute deeply into a range of government ethics issues that may be better handled at the state level," Congress may have intended to cabin § 666 "to the hard-core area of bribery[,] where any federal interest in government integrity will be stronger." Brown, *supra*, at 310 (footnote omitted).

A second (and related) reason why Congress may have limited § 666 to bribery is to avoid what has been characterized as federal overcriminalization. *See generally* Weitz, *supra*, at 840; Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *In the Name of Justice* 43-56 (Timothy Lynch ed., 2009); Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 Hastings L.J. 1247, 1249-50

(1995). In other words, Congress may have been wary of venturing too far into the thickets of state and local corruption, which often implicate the political processes of the state. *See* Brown, *supra*, at 310.

In *Sun-Diamond*, a case addressing the scope of § 201's gratuity provision, the Supreme Court noted that,

> when Congress has wanted to adopt . . a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion.
>
> . . .
>
> [Because] this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions . a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.

526 U.S. at 408, 412. Here, too, we feel obligated to choose the scalpel. Other than the ambiguous use of the word "rewarded," the text of § 666, as well as its legislative history and purpose, do not support the argument that Congress intended the statute to reach gratuities. The statute was amended in a way that brought its language closer to § 201's bribery provision, and further from § 201's gratuity provision, suggesting the true targets of § 666 are bribes, not gratuities. Critically, accepting that § 666 criminalizes gratuities would expose defendants convicted of gratuities violations under § 666 to penalties far greater than those faced by individuals convicted of gratuities violations under § 201—a strange outcome

that we doubt Congress intended. We therefore hold that gratuities are not criminalized under § 666.[15]

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[15] We have two responses to the thoughtful concurrence of our colleague that the statute is unclear enough that the rule of lenity precludes Defendants' convictions to the extent that they could have rested on a gratuity. First, the rule of lenity is rarely applied, and should be reserved for situations in which, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 130 S. Ct. 2499, 2509-10 (2010) (citations omitted) (internal quotation marks omitted); *see also Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) ("The simple existence of some statutory ambiguity . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree."); *United States v. Jimenez*, 507 F.3d 13, 21 (1st Cir. 2007) ("[G]enuine ambiguity requires more than a possible alternative construction."); *accord United States v. Flemming*, 617 F.3d 252, 272 (3d Cir. 2010) (noting that "[a]pplication of the rule of lenity is called for only in rare cases"). We have construed § 666 using traditional tools of construction and find no grievous ambiguity or uncertainty. Lenity is therefore inapplicable. *See Councilman*, 418 F.3d at 83.

Second, we acknowledge, as our colleague notes, that the Federal Sentencing Guidelines Manual applies separate guidelines for bribes and gratuities under § 201, and it states that *both* of these guidelines are applicable to § 666. U.S. Sentencing Guidelines Manual app. A (2011). Some have suggested that this determination on the part of the Sentencing Commission "weighs in favor of a conclusion that § 666 encompasses bribes and gratuities." *See, e.g.*, Mark S. Gaioni, Note, *Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. § 666*, 46 Colum. J. L. & Soc. Probs. 207, 239-41 (2012). We disagree. The Sentencing Commission is in the business of "establish[ing] sentencing policies and practices for the Federal criminal justice system" and "develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective," 28 U.S.C. § 991(b); it is *not* in the business of determining what type of conduct a statute does and does not criminalize. *See, e.g., United States v. Morales*, 590

C. Conclusion

Given this holding, the language in paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21 had no place in the § 666 instructions. By including that language, the court improperly invited the jury to convict both Martínez and Bravo for conduct involving gratuities rather than bribes. Consequently, the jury was allowed to convict Martínez and Bravo on a legally erroneous theory. Although other parts of the jury instructions accurately stated the requirements for a bribery conviction, the fact remains that the jury was confronted with the flatly contrary instructions in paragraph ten of Jury Instruction 20 and paragraph eleven of Jury Instruction 21. As noted, the government's closing argument improperly invited the jury to convict the Defendants on the proscribed "gratuity theory," and the evidence presented at trial could support a finding that the "payment" Bravo gave and Martínez received constituted a gratuity. *See supra* Part III (A)(2). Under these circumstances, we

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F.3d 1049, 1052 (9th Cir. 2010) ("Of course, the Commission can't tell federal courts how to interpret statutes."). The Commission's choice to apply the gratuities guideline to § 666 therefore carries no weight in our analysis. *Cf. DePierre v. United States*, 131 S. Ct. 2225, 2236 (2011) ("We have never held that, when interpreting a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines."); *United States v. Gowing*, 683 F.3d 406, 410 (2d Cir. 2012) ("The Sentencing Commission, which promulgates the Guidelines, is entitled to no deference when it interprets criminal *statutes.*"); *United States v. Palacio*, 4 F.3d 150, 155 (2d Cir. 1993) ("[U]nless the Sentencing Commission is construing its own authority as an agency, its view of the substantive meaning of a criminal statute is unlikely to be entitled to any deference." (internal citations omitted)).

cannot say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."[16] *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). We therefore conclude that we must vacate Defendants' convictions under § 666 because of the deficiencies in Jury Instructions 20 and 21. *See Fiore v. White*, 531 U.S. 225, 228 (2001) (holding that conviction of defendant for conduct that a "criminal statute, as properly interpreted, does not prohibit . . violate[s] due process").

IV.

Defendants argue that their convictions should be reversed because the indictment was barred by the statute of limitations. The alleged unlawful conduct at issue took place through May 2005. The indictment against Defendants was returned on June 22, 2010, more than five years after the conduct occurred. Pursuant to 18 U.S.C. § 3282(a), "[e]xcept as otherwise expressly provided by law, no person shall be

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[16] Even if a defendant has properly preserved his objection to an incorrect jury instruction, we will not set aside the verdict if we find that the error was harmless. *United States v. Sasso*, 695 F.3d 25, 29 (1st Cir. 2012). However, we measure harmless error in a criminal case using two distinct standards. The stricter standard, known as the *Chapman* standard, is "applicable mainly to issues of constitutional dimension, [and] requires the government to prove beyond a reasonable doubt that the error did not influence the verdict." *Id.*; *see Chapman v. California*, 386 U.S. 18, 23-24 (1967). The less stringent standard we cite above, called the *Kotteakos* standard, is "applicable mainly to trial errors that are not of constitutional dimension." *Sasso*, 695 F.3d at 29. Here it makes no difference what standard we apply because, even assuming the applicably of the less stringent *Kotteakos* standard, the error was not harmless. *See id.*

prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." However, Defendants signed tolling agreements waiving their right to allege an affirmative defense based on the statute of limitations.[17] Defendants maintain that (1) the tolling agreements were void because they were not properly executed by the government, and (2) even if they were not void, the tolling agreements did not extend the statute of limitations period for a gratuity theory of liability on the § 666 counts.

"We review de novo a district court's decision not to dismiss on statute of limitations grounds." *United States v. Munoz-Franco*, 487 F.3d 25, 52 (1st Cir. 2007); *see also United States v. Spector*, 55 F.3d 22, 25 (1st Cir. 1995) (applying de novo review to question of whether tolling agreement was effective waiver of defendant's rights under statute of limitations). Defendants argue that the tolling agreements never became effective because, although both Defendants and their attorneys signed them, they were never signed by the government. They rely primarily on our opinion in *United States v. Spector* to support this argument. In *Spector*, the government and the defendants sought to enter into a tolling agreement that would bar the application of the § 3282 limitations period. 55 F.3d at 23. That agreement

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[17] The record does not disclose the precise reason why Defendants signed the tolling agreements. However, "[s]uch agreements are typically entered into in exchange for the government's agreement not to indict before a certain time in the hope that further discussion may result in a more favorable disposition or prevent an indictment altogether." Robert S. Hunter, *Fed. Trial Handbook: Criminal* § 12:28 (2012).

provided that it would be effective "'upon execution by [the defendants] and their respective counsel and the United States by its counsel.'" *Id.* at 24. The agreement was signed by the defendants and their counsel, but not by counsel for the government. *Id.* We found that the tolling agreement was ineffective, pointing to, inter alia, the unambiguous language in the agreement. *Id.* at 25.

Defendants argue unpersuasively that we should extend *Spector* to the facts of this case. We summarized our holding in *Spector* as follows: "[w]here the parties have so deliberately set forth in writing the conditions necessary to make their agreement effective, we think it inadvisable for a court to condone deviation from one of the explicit terms, absent some good reason to do so." *Id.* We also explicitly limited our holding:

> We emphasize that we are not saying that, to be enforced, an agreement to extend the statute of limitations must be made in writing, or must be signed by the government. We say only that, *where the parties themselves have chosen to set forth the terms in writing*, it makes sense to hold them to those terms, absent good reason to do otherwise.

Id. at 26 n.4 (citations omitted).

Defendants' tolling agreements in the present case state: "*By signing this document*, I knowingly and voluntarily waive any rights I may have under the statute of limitations regarding charges which may result from the grand jury investigation . . . provided that such charges are brought on or before June 25, 2010." (Emphasis added.) The agreements thus make clear that their provisions will go into effect when

signed by Defendants; nothing in the agreements require counsel for the United States to sign the document as a condition of enforceability. We therefore conclude that the failure of the government to sign the tolling agreements does not render them invalid.

As to Defendants' second argument, we need not determine whether the tolling agreements cover a gratuity theory of liability under § 666, as we have found that § 666 does not criminalize gratuities. The government may not pursue a conviction on that ground if Defendants are retried.

V

Bravo challenges his conviction on count one for conspiracy to violate the Travel Act, claiming that he is entitled to a judgment of acquittal on that count.

A. Background

Count one of the indictment charged Bravo with conspiring with Martínez and de Castro Font to commit two different crimes: (1) bribery in violation of § 666 and (2) traveling in interstate commerce in violation of 18 U.S.C. § 1952 ("the Travel Act"). A Travel Act charge must identify an unlawful purpose for the travel,[18] and the Travel Act conspiracy alleged

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[18] Section 1952, which is titled "Interstate and foreign travel or transportation in aid of racketeering enterprises," states, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

against Bravo specified that his travel was to aid "racketeering"—a term that covers various types of unlawful activity.[19] In this case, the only racketeering conduct that has been identified by the government is bribery in violation of federal and Puerto Rico laws.[20] Indeed, count two, which alleged a substantive Travel Act violation, charged Bravo with traveling in interstate commerce with the intent to commit those two types of bribery, i.e., in violation of § 666 and in violation of Puerto Rico law.

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(3) promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both

[19] A "racketeering activity" is defined in the United States Code as "any act or threat" involving certain specified crimes, including bribery, "which is chargeable under State law and punishable by imprisonment for more than one year," as well as any act indictable under numerous federal statutory provisions, including the Travel Act. *See* 18 U.S.C. § 1961(1); *see also* 18 U.S.C. § 1959(b)(1) (adopting the meaning of "racketeering activity" set forth in § 1961).

[20] The Travel Act object of the conspiracy described in the indictment reads as follows:

> Interstate Travel in Aid of Racketeering: that is, to travel in interstate commerce from the Commonwealth of Puerto Rico to the State of Nevada, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on, of an unlawful activity, to wit bribery in violation of the laws of the United States and the Commonwealth of Puerto Rico, in violation of Title 18, United States Code, Sections 1952(a)(3)(A) and 2.

On count one, the jury found Bravo guilty of conspiracy, but it rejected the § 666 (federal bribery) objective. It found that he had conspired only to travel in interstate commerce "in aid of racketeering." The jurors were not asked to specify the unlawful activity that was the purpose of the travel.[21] However, on count two, the substantive Travel Act offense, the jury found Bravo guilty of traveling in interstate commerce with the intent to commit bribery in violation of Puerto Rico bribery law. The jury found that he did *not* violate the Travel Act with the intent to commit § 666 bribery. Thus, in both the context of identifying the object of the alleged conspiracy (§ 666 bribery or Travel Act) and in the context of choosing the unlawful activity that was the target of the Travel Act (§ 666 bribery or bribery under Puerto Rico law), the jury rejected the allegation that Bravo's conduct implicated the federal bribery statute.

Bravo moved for a judgment of acquittal on count two because the Puerto Rico bribery statutes that provided the predicate for the Travel Act violation were repealed before the Las Vegas trip took place. Specifically, the laws were repealed on June 18, 2004, nearly one year before the trip; the repeal became

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[21] The combination of a conspiracy offense and the Travel Act produces unusual complexity because each requires an unlawful objective. The result is that, when the two crimes are charged together, the government must show multiple layers of predicates. Hence, to prove a conspiracy to violate the Travel Act, the government must show (1) a conspiratorial agreement (2) to travel (3) in aid of a specified unlawful activity. Here, the verdict form identified only the generic "racketeering" as the purpose of the Travel Act conspiracy, though it alleged two Travel Act objectives in the substantive count: bribery under § 666 and bribery under Puerto Rico law. As noted, the jury found only the latter.

effective on May 1, 2005, about two weeks before the trip took place. Because § 1952 requires the commission of an overt act to promote the criminal object of the travel *after* the interstate travel takes place, *see* 18 U.S.C. § 1952(a), the district court granted Bravo's motion, concluding that "the acts that defendant Bravo took to fulfill the 'thereafter' requirement all occurred after May 1, 2005, and therefore, after section 4363 was repealed. Defendant Bravo cannot be convicted of conduct that was effectively not a crime at the time the offense took place." *United States v. Bravo-Fernandez*, 828 F Supp. 2d 441, 449 (D.P.R. 2011).[22]

Bravo also moved for acquittal on the conspiracy charge, arguing that the conspiracy conviction—which was based on a Travel Act violation—necessarily must fall with the substantive Travel Act charge. His theory was as follows: if the only target of the Travel Act found by the jury when considering the substantive Travel Act charge (count two) was to further a violation of the Puerto Rico statutes, and that targeted activity was not unlawful, there could be no unlawful *conspiracy* to violate the Travel Act. In other words, he argued that the conspiracy count must be dismissed because the jury verdicts rejecting § 666 as an object of the conspiracy and as a predicate for the *substantive* Travel Act charge left only the repealed Puerto Rico bribery laws as the crime the jury could have found as the racketeering activity alleged to be the target of the

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[22] Although the Commonwealth legislature enacted new bribery provisions to replace the repealed statutes, the government has not argued that the new laws provide any basis for the convictions here.

Travel Act conspiracy. In that circumstance, there was no viable predicate for the Travel Act conspiracy.

The district court denied the motion. It held that the jury could have reached different conclusions about the objective of Bravo's travel when separately considering the conspiracy and substantive Travel Act counts. Stated otherwise, the court found that the jury's unelaborated finding on count one that Bravo had *conspired* to travel "in aid of racketeering" could have reflected a finding that Bravo had conspired to violate the Travel Act with the intent to promote federal program bribery. The court considered this outcome possible even though, when considering the *substantive* Travel Act crime (count two), the jury found that Bravo did not violate the Travel Act for that purpose *and* even though the jury explicitly found (on count one) that Bravo did *not* conspire to violate § 666. The court held that any inconsistency in such a scenario was not problematic.

On appeal, Bravo reiterates his argument for acquittal on the conspiracy charge. He again asserts that it was impossible to engage in a conspiratorial agreement to travel to violate the Puerto Rico bribery statutes on May 13, 2005, two weeks after the repeal became effective and nearly a year after the legislature voted to repeal the statutes, because "one cannot conspire to commit a nonexistent crime." In addition, he maintains that, even if the district court correctly ruled that he could be convicted for conspiring to travel in connection with a bribery that is unlawful under § 666—despite the jury's rejection of federal bribery as the predicate for his substantive Travel Act offense—the conspiracy conviction cannot stand. The problem, he asserts, is that it is impossible

to tell whether the jury based its Travel Act conspiracy finding on the federal or Commonwealth statutes.

The government, noting that a defendant may be convicted on a conspiracy charge even if he does not successfully complete the crime that is the object of the conspiracy, argues that the jury could have found that Bravo conspired to travel to violate the Puerto Rico bribery laws if an overt act was taken before the statute was repealed. The government points out that the statute was still in effect when Bravo booked the hotel reservations, ordered the boxing tickets, and took other acts "which were in furtherance of the corrupt exchange." The government interprets Bravo's argument to be a legal impossibility defense—i.e., he could not be found guilty because it would have been impossible for him to commit the crime—and states that "[c]ourts have come to abolish impossibility as a defense, particularly with respect to the crime of conspiracy."

Having set the scene, we now proceed to consider whether Bravo's conspiracy conviction may stand with either § 666 or Puerto Rico bribery law as the Travel Act predicate.

B. Conspiracy to Violate the Travel Act to Promote Puerto Rico Bribery

Although the government is correct that "legal impossibility" is often an ineffective defense in a conspiracy case because a conspiracy charge does not require a completed crime, Bravo's argument implicates a more potent form of the doctrine. He invokes what has been referred to as "pure legal impossibility," which arises when no statute "proscribe[s] the result that the defendant expected, desired, and intended to

achieve." *See* Ira P. Robbins, *Attempting the Impossible: the Emerging Consensus*, 23 Harv. J. on Legis. 377, 390 (1986); *see also United States v. Farner*, 251 F.3d 510, 513 n.2 (5th Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). "Pure legal impossibility is always a defense. For example, a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place." *United States v. Hsu*, 155 F.3d 189, 199 n.16 (3d Cir. 1998). Although *Hsu*'s hypothetical discussed pure legal impossibility in the context of attempts, "[o]bviously a charge of conspiracy to shoot a deer would be equally untenable." *In re Sealed Case*, 223 F.3d at 779.

The type of legal impossibility that the government cites has been referred to as "mixed fact/law impossibility." Such cases "involve a factual mistake relating to a legal determination. In every case . . . a pre-existing law proscribed the actor's goal, thus distinguishing this category from pure legal impossibility." Robbins, *supra*, at 394. These cases "use[] the label 'legal impossibility' to refer to the impossibility of actually accomplishing the intended plot," although there is never "any question that if the plot had succeeded the conduct itself would be criminal." *United States v. Ali*, 561 F. Supp. 2d 265, 267-68 (E.D.N.Y. 2008).

This is a case of pure legal impossibility. The jury found a conspiracy to violate the Travel Act with the intent to facilitate racketeering activity (either federal or state bribery). The evidence shows, and the indictment alleges, that the travel underlying the charge was to take place on a specific date to coincide with the boxing match between Felix Trinidad and Winky Wright scheduled for May 14, 2005—nearly

two weeks after the repeal of the Puerto Rico bribery statutes was to go into effect. Thus, the jury could not have found Bravo guilty of conspiracy to violate the Travel Act for the purpose of aiding a violation of these *Puerto Rico* bribery laws because the alleged agreement was to travel at a time when Bravo's conduct could not violate those laws. That the plans to take the trip to Las Vegas were allegedly made before the statute's repeal took effect is of no significance, since the plans envisioned travel on a specific date—*after* May 1. In this case, "a pre-existing statute [did] not proscribe the result that the defendant expected, desired, and intended to achieve," Robbins, *supra*, at 390, because the Puerto Rico bribery statutes at issue would no longer "exist" when the travel was to take place. In short, Defendants were "conspiring" to do something that would not be prohibited by these Puerto Rico bribery laws on the date they planned to do it.[23]

An extension of the deer hunting hypothetical used in *Hsu* and *In re Sealed Case* illustrates this point. Assume that deer hunting season begins on September 1; it is against the law to hunt deer before September 1. On August 15, a man and his friend visit a sporting goods store to purchase rifles and ammunition, intending to use them to hunt deer on September 2. Are the men guilty of conspiring to illegally hunt deer? They are not: although their planning took place during a time when it would have been illegal to engage in the subject activity, no statute

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[23] We reject the government's assertion that Bravo may not benefit from the repeal without demonstrating that he had notice of it.

prohibited that activity on the date on which they planned to engage in it.

It therefore follows that, with respect to the Puerto Rico bribery basis for the alleged Travel Act violation, "since the conduct allegedly underlying the conspiracy was not a crime, no . conspiracy to commit that conduct can exist either." *Ali*, 561 F. Supp. 2d at 267.[24] The government claims, however, that even if the Puerto Rico bribery predicate must be struck, the jury could have relied on § 666 as a predicate for the conspiracy to violate the Travel Act. We now turn to that possibility.

C. Conspiracy to Violate the Travel Act to Promote Federal Bribery

The government urges us to adopt the view taken by the district court, i.e., that the jury's rejection of § 666 as a direct object of the conspiracy and as a predicate for the substantive Travel Act violations does not negate the possibility that the jury could have found that the conspiracy to violate the Travel Act involved planning to travel to violate § 666. The gist of this approach is that the jury could have found that Bravo

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[24] In this case, it is not pertinent that, at the time Bravo and the others agreed to travel, the repeal of the Puerto Rico bribery statutes at issue had not yet gone into effect. The state of the law at the time of their agreement was such that, on the day they planned to travel, such travel would not be unlawful. Hence, there was no unlawful objective of their agreement, and therefore no basis for a conspiracy charge.

It might be a different case if, at the time they agreed, the legislature had not already decided to change the state of the law effective May 1, 2005. In other words, we do not address the hypothetical situation in which Bravo and his cohorts had set their plan in motion before the legislature acted to repeal the statutes.

conspired with others to travel for the purpose of promoting federal bribery, while also finding that he neither agreed with others directly to commit federal bribery (its finding on count one) nor in fact traveled to promote federal bribery (its finding on count two). The government admits that such a view of the jury's judgments appears inconsistent, but it asserts that the verdicts are reconcilable and therefore permissible. It cites precedent in which inconsistent verdicts have been upheld. *See, e.g., United States v. Powell*, 469 U.S. 57, 69 (1984).

But the problem here is not merely the possibility of inconsistent verdicts. Rather, even if we were to assume that the jury *could* have relied on a § 666 theory in finding Bravo guilty on the Travel Act conspiracy count, we do not in fact know whether the racketeering activity found by the jury as a predicate was bribery under federal law or bribery under the repealed Puerto Rico statutes. We are thus confronted with a situation in which "the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978). "When a jury has been presented with several bases for conviction, one of which is legally erroneous, and it is impossible to tell which ground the jury convicted upon, the conviction cannot stand." *United States v. Sawyer*, 85 F.3d 713, 730-31 (1st Cir. 1996); see also *United States v. Mubayyid*, 658 F.3d 35, 71 (1st Cir. 2011); *United States v. Kavazanjian*, 623 F.2d 730, 739-40 (1st Cir. 1980) (reversing verdict on multi-object conspiracy conviction under § 371 where one object failed to state a crime). We therefore conclude that Bravo's conspiracy conviction cannot be upheld.

But our inquiry does not end here. The question remains whether the judgment entered on count one as to Bravo must be reversed or whether it should be vacated and the case remanded for further proceedings. Generally, when we find that a conviction cannot stand because the jury may have convicted upon a legally invalid basis, we will remand for a new trial, provided that there is sufficient evidence to support a conviction on a valid basis (or bases). *See United States v. Pendergraft*, 297 F.3d 1198, 1210 (11th Cir. 2002); *Kavazanjian*, 623 F.2d at 739. The government argues for that course here. It maintains that the evidence was sufficient for the jury to find that Bravo conspired to travel in interstate commerce to violate § 666 and, hence, he should be retried on count one.

We disagree. Regardless of the sufficiency of the evidence, retrial on the conspiracy count is barred by the Double Jeopardy Clause.[25] While the Double Jeopardy Clause is widely understood to bar retrial on a charge on which a defendant was previously acquitted, *Yeager v. United States*, 557 U.S. 110, 117-18 (2009), it also "precludes the Government from relitigating any issue that was *necessarily decided* by a jury's acquittal in a prior trial," *id.* at 119 (emphasis added); *see also Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970); *United States v. Orrego-Martinez*, 575 F.3d 1, 6 (1st Cir. 2009). This is known as the "issue preclusion" or "collateral estoppel" prong of the Double Jeopardy Clause. *United States v. Coughlin*, 610 F.3d 89, 95 (D.C. Cir. 2010); *United States v. Wittig*, 575 F.3d 1085, 1095 (10th Cir. 2009). In determining what was "necessarily decided" for purposes of issue

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[25] Although Bravo did not formally label his challenge to the conspiracy conviction as a double jeopardy challenge, the logical conclusion of his argument is exactly that.

preclusion, the Supreme Court has recently reaffirmed that "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Yeager*, 557 U.S. at 119-20 (quoting *Ashe*, 397 U.S. at 444). The Court has made clear that this "inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings,'" *id.* (quoting *Ashe*, 397 U.S. at 444), and that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality," *Ashe*, 397 U.S. at 444.

Here, the jury's verdict on count one did not expressly acquit Bravo on a Travel Act conspiracy whose purpose was to promote § 666 bribery. The verdict form for count one asked the jury to answer "yes" or "no" only as to whether Bravo had conspired to violate the Travel Act "in aid of racketeering," without specifying any racketeering activity. However, federal program bribery in violation of § 666 was one of the two racketeering crimes alleged in the indictment and argued by the government—the other being bribery in violation of Puerto Rico law. Significantly, the jury did render a conspiracy judgment with respect to § 666, rejecting federal bribery as a direct object of the conspiracy. The pertinent question, then, is this: by unambiguously stating on the verdict form that Bravo did *not* conspire to violate § 666, did the jury also "necessarily decide" that he did not conspire to *travel* for the purpose of violating § 666? Taking a practical, realistic approach to this question, we must answer it in the affirmative.

First, we find it difficult to fathom how the jury could have found that Bravo conspired to travel for the purpose of violating § 666 without also finding that he conspired to violate § 666. The jury's explicit rejection of the allegation that Bravo conspired to violate § 666 is strong evidence that the jury did not find federal program bribery to be the racketeering activity underlying the Travel Act conspiracy. *Cf. United States v. Cabrera*, 804 F Supp. 2d 1261, 1267-70 (M.D. Fla. 2011). Second, the jury found on count two—the substantive Travel Act count—that Bravo was guilty *only* of traveling with the intent to commit bribery in violation of Puerto Rico law. Again, the jury explicitly rejected allegations that either the conspiracy or the Travel Act conduct implicated § 666.

Given these other § 666 judgments by the jury, we conclude that its verdict on the Travel Act conspiracy can only rationally be understood as a finding that Bravo conspired to travel to Las Vegas in mid-May 2005 for the purpose of promoting Puerto Rico bribery. We will not bend over backwards to formulate some route by which the jury could have conceivably found that § 666 was the predicate of the Travel Act conspiracy when any reasonable assessment of the verdict shows that no such road was taken. We therefore conclude that re-prosecuting Bravo on count one would violate the Double Jeopardy Clause.

VI.

Martínez also challenges his conspiracy conviction. As we shall explain, although the circumstances are different from Bravo's, the outcome is the same.

A. Background

The jury indicated that it unanimously found Martínez guilty of conspiracy on count one. The verdict form listed three potential objects of the conspiracy, and the jury was instructed to "check all that you unanimously find to apply." The jury checked "No" as to each of the three identified objects of the conspiracy. In other words, although the jury was unanimous in finding that Martínez was guilty of conspiring to do something illegal, they were not unanimous in their view of what that illegality was.

Immediately after the verdict was read by the courtroom deputy, Martínez's attorney, Mr. Lowell, asked the court to strike the verdict on count one, stating: "As to Hector Martínez, they found 'no' for all the particulars, so, consequently, this is an impossibility." The court and the government were uncertain about the proper course. Lowell, however, remained steadfast, asserting that "as to Count 1, by law, you have to enter the verdict of not guilty as to Count 1 as to Mr. Martínez."

Lowell then asked the court to poll the jury individually as to count five, the substantive federal bribery count. The government recommended that the court simply take a general poll. Bravo's attorney, Mr. Chesnoff, asked that the jury be polled individually "as to every count and every specification," stating that "[y]ou have a jury that has obviously been confused about its verdict." The court rejected both defense attorneys' requests and conducted only a general poll, asking each juror if the verdict announced by the courtroom deputy was his or her verdict. This approach did not clarify the issue with the conspiracy verdict as to Martínez.

After the jury was polled, the court asked if there were any motions by the defense. Attorney Lowell reiterated his contention that "the Court must vacate Count 1." The court responded: "All right. Well, let me discharge the jury, and well—we'll deal with those legal matters later." The jury was escorted from the courtroom, and Lowell again stated that the jury's verdict on Martínez's conspiracy charge was "a legal impossibility," and "that being the case, the Court must strike that guilty verdict. There's no alternative." The government pushed back, asking the court for time to brief the issue before it made its decision. After some further back and forth, the court stated: "I agree with Mr. Lowell. Count 1 as far as Defendant Martínez is dismissed." The discussion then shifted to other matters.

In a short order issued the next day, the court sua sponte "reinstated" Martínez's conviction on count one "without prejudice of the parties having a full opportunity to brief the issues discussed in open court." Martínez filed an eighteen-page brief three days later, stating that the court's change of course was "beyond surprising" and insisting that the further proceedings ordered by the court "are an affront to the Fifth Amendment's Due Process and Double Jeopardy Clauses, and the Sixth Amendment's right to trial by jury." He argued that "[a]lthough the statutory basis for Mr. Lowell's motion and this Court's decision was not cited, it was plainly a motion made and a judgment rendered under [Federal] Rule [of Criminal Procedure] 29," and that double jeopardy therefore attached. The government filed a "non-opposition" to Martínez's motion shortly thereafter, indicating that "the Court should dismiss defendant Martínez's guilty verdict on Count One." The next day, however, the government filed a supplemental response, arguing that, at most,

Martínez would be entitled to a mistrial pursuant to Federal Rule of Criminal Procedure 33 on count one and a dismissal without prejudice, not a Rule 29 dismissal based on insufficiency of the evidence. Martínez replied that the dismissal sought and granted was a dismissal pursuant to Rule 29, that the dismissal was properly granted, and that the court's decision could not be withdrawn or relitigated, as jeopardy attached to it.

On August 30, 2011, the district court issued an order stating that the initial dismissal did not preclude a mistrial. The court stated that because it did not explicitly make a finding that the evidence was insufficient to sustain the conviction, Rule 29 was not implicated. Instead, it maintained that "the Court 'dismissed' [the] verdict based on defense counsel's claim of 'legal impossibility.'" Moreover, the court stated that even if its actions fell within the scope of Rule 29, the Double Jeopardy Clause permits a prosecution appeal to reinstate a jury's guilty verdict that a judge subsequently discarded.

B. Legal Principles

The Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V The Double Jeopardy Clause "shields a defendant from a second prosecution for the same offense after either conviction or acquittal." *United States v. Morris*, 99 F.3d 476, 478 (1st Cir. 1996). In determining whether the Double Jeopardy Clause has been violated, "a reviewing court first must ask whether jeopardy attached in the original [trial] court proceeding." *United States v. Pacheco*, 434 F.3d 106, 112 (1st Cir. 2006) (alteration in original) (citation omitted) (internal quotation marks omitted).

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (alteration in original) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)). We have previously held that "[i]t is beyond cavil that, for double jeopardy purposes, the finality accorded to jury verdicts of acquittal extends equally to judicially rendered judgments of acquittal." *Pacheco*, 434 F.3d at 112. It is therefore critical to determine whether the district court's statement that "Count 1 as far as Defendant Martínez is dismissed" constitutes a judgment of acquittal.

The Supreme Court has repeatedly "emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *Martin Linen*, 430 U.S. at 571; *see also United States v. Scott*, 437 U.S. 82, 96 (1978); *United States v. Sisson*, 399 U.S. 267, 290 (1970). Instead, a reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571; *see also Pacheco*, 434 F.3d at 112. That the district court did not explicitly invoke Rule 29 in "dismissing" count one, then, is not dispositive on the issue of whether its actions constituted an acquittal. *Cf. United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971) ("[T]he trial judge's characterization of his own action cannot control the classification of the action for the purposes of our appellate jurisdiction.").

The difficulty in this case is that the district court's assessment of the conspiracy charge as to Martínez does not directly engage with the facts presented at trial. Instead of the normal inquiry into factual sufficiency, the court's determination that the conspiracy count must be "dismissed" appears to be based on a legal conclusion regarding the requirements of a conspiracy conviction under 18 U.S.C. § 371—specifically, that if the jury cannot reach an agreement as to the object of a conspiracy, the conviction cannot stand as a matter of law. The Supreme Court, however, has not limited acquittals for double jeopardy purposes to cases involving factual assessments of the evidence presented to the jury. In several cases, including one decided earlier this year, the Supreme Court has held that legal determinations by the court can create a double jeopardy bar to retrial.

In *Arizona v. Rumsey*, an Arizona trial judge conducted a sentencing hearing to determine whether a defendant convicted of armed robbery and first degree murder was eligible for the death penalty. 467 U.S. 203, 205 (1984). The trial judge mistakenly held that Arizona's statutory aggravating factor covering killings for pecuniary gain was limited to "a contract-type killing situation and not robbery, burglary, etc." *Id.* at 206 (quotation marks omitted). The judge therefore found no aggravating circumstances and sentenced the defendant to life imprisonment. *Id.* The State successfully appealed to the Supreme Court of Arizona and obtained a death sentence on remand under the proper standard. *Id.* at 207-08. The U.S. Supreme Court found that the retrial on the penalty phase issue was a double jeopardy violation, because the trial judge's original "judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and,

as such, bars any retrial of the appropriateness of the death penalty." *Id.* at 211. It continued:

> In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. *Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits.* "[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . affects the accuracy of that determination, but it does not alter its essential character."

Id. (quoting *United States v. Scott*, 437 U.S. 82, 98 (1978)) (emphasis added) (internal quotation marks omitted).

Just two years after *Rumsey*, the Court considered another case in which a judge's "legal determination" was at issue. In *Smalis v. Pennsylvania*, the Supreme Court of Pennsylvania held that a demurrer, which requires the court to determine "whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt," does not involve a factual determination, but rather "purely one of law," and is therefore not the equivalent of an acquittal for double jeopardy purposes. 476 U.S. 140, 143 (1986) (internal quotation marks omitted). The U.S. Supreme Court reversed in a brief opinion, stating that "[w]hat the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt," which constitutes an acquittal under the Double Jeopardy Clause. *Id.* at 144.

The Court recently reaffirmed its positions in *Rumsey* and *Smalis* in *Evans v. Michigan*, 133 S. Ct. 1069 (2013). In Evans, the Supreme Court considered "whether retrial is barred when a trial court grants an acquittal because the prosecution had failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Id.* at 1074. The Court found that, in substance, the issue was no different than the one presented in *Rumsey*: it "involve[d] an antecedent legal error that led to an acquittal because the State failed to prove some fact it was not actually required to prove." *Id.* at 1076. The fact that *Evans* involved the addition of a nonessential element, while *Rumsey* involved only the misinterpretation of an essential element, was of no moment to the Court. *Id.* at 1076-77. The Court held that the trial court's "judgment, however erroneous it was, precludes reprosecution." *Id.* at 1078 (internal quotation marks omitted).

C. Application

With these decisions in mind, we have little difficulty concluding that the district court's "dismissal" of the conspiracy count against Martínez was an acquittal. Rightly or wrongly,[26] the court agreed with Lowell's assertions that a conspiracy with no object was "a legal impossibility," and that the jury's verdict

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[26] Because the correctness of the district court's decision on this issue is irrelevant, we choose not to address it, other than to note that there appears to be no case law directly on point. Martínez relies primarily upon an out-of-circuit district court case involving facts that differ materially from the present case, *United States v. Lucarelli*, 490 F. Supp. 2d 295 (D. Conn. 2007), while the government cites to an Eighth Circuit case that involved a special verdict form in a bankruptcy fraud case, *United States v. Mitchell*, 476 F.3d 539 (8th Cir. 2007). Neither offers clear guidance.

must be "struck" and the count "dismissed." In so finding, the court made a determination as to the legal requirements necessary for a conspiracy conviction under § 371 and concluded that the jury had found the evidence insufficient to meet those requirements.[27] For our purposes, it does not matter if this interpretation of § 371 added "an 'element' of the offense that, in actuality, [the government] did not have to prove," *id.* at 1074; misconstrued the actual elements of the statute, *Rumsey*, 467 U.S. at 211; or faithfully adhered to the statute's requirements. All that matters is that the district court made "a determination that the [government] had failed to prove its case." *Evans*, 133 S. Ct. at 1075.

One issue remains for our consideration. In declaring a mistrial, the district court found that even if the initial "dismissal" could be considered a judgment of acquittal, the Double Jeopardy Clause would not prevent an appeal by the government to reinstate the jury's original guilty verdict. In support of this proposition, the court cited *Smith v. Massachusetts*, which states:

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[27] Although double jeopardy cases in which courts order an acquittal based on the sufficiency of the evidence ordinarily involve the court's assessment of the evidence itself, the principles are equally applicable in this somewhat different context. Here, the court determined that the jury had functionally acquitted Martínez on the conspiracy count. *See Evans*, 133 S. Ct. at 1075 ("[A]n 'acquittal' includes a ruling by the court that the evidence is insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability, and *any other rulin[g] which relate[s] to the ultimate question of guilt or innocence*." (alterations in original) (emphasis added) (citations omitted) (internal quotation marks omitted)).

> Our cases have made a single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury: When a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty.

543 U.S. 462, 467 (2005). Although at first blush this principle, first announced in *United States v. Wilson*, 420 U.S. 332, 352-53 (1975), seems potentially applicable to the present case, it is not.

As the Court noted in *Rumsey*, "[n]o double jeopardy problem was presented in *Wilson* because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy." 467 U.S. at 211-12. The *Rumsey* Court found that the *Wilson* exception was inapplicable to that case, because "[w]hereas the defendant in *Wilson* was not to be subjected to a second trial after an acquittal at his first, that is precisely what . . . happened" to Rumsey. The Court has made clear that the *Wilson* exception does not violate the Double Jeopardy Clause precisely because allowing appeal in those circumstances does not subject a defendant "to further factfinding proceedings going to guilt or innocence" following an acquittal. *Smith*, 543 U.S. at 467 (internal quotation marks omitted); *see also Smalis*, 476 U.S. at 145 ("[S]ubjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.").

Here, the government presumably requested a dismissal without prejudice of Martínez's conviction so that it can reprosecute him under § 371. If we were to allow the district court to recast its acquittal as a mistrial, the government would get another opportunity to subject Martínez to "factfinding proceedings going to guilt or innocence," hoping this time for a less ambiguous result. That would be a classic instance of impermissible double jeopardy. Because the court's "dismissal" was an acquittal for double jeopardy purposes, and because the *Wilson* exception does not apply, the decision cannot be reconsidered. *See Smith*, 543 U.S. at 470-73.

VII.

For the foregoing reasons, we *reverse* Bravo's conspiracy conviction, and *reverse* the district court's order declaring a mistrial as to Martínez's conspiracy count. We direct the district court to enter a judgment of acquittal on both charges. We *vacate* Martínez's and Bravo's § 666 convictions and *remand* for further proceedings consistent with this opinion.

– Concurring Opinion Follows –

HOWARD, *Circuit Judge*, concurring in part and concurring in the judgment. I join the court's judgment, although on one issue I would reach the same result by a different route. The majority concludes, as a matter of law, that Section 666 does not criminalize gratuities. I believe that the statute is unclear enough that the rule of lenity precludes the defendants' convictions to the extent that they could have rested on a gratuity. While the majority does an admirable job of explaining its reasoning, other considerations give me pause.

First, the Supreme Court has stated that "[a]n illegal gratuity . . . may constitute merely a *reward* for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999) (emphasis added). Thus, a "reward" can be a payment that does not influence an official's actions, a reading that the majority rejects when interpreting Section 666. Although the Court was not interpreting Section 666 or defining the word "reward," it was interpreting Section 201, a closely related statute. Thus, I hesitate to conclude that the meaning of "reward" as used in Section 666 is at odds with the Court's use of that word.

Second, a problem arises if we read the bribery provision of Section 201(b) to prohibit the same conduct as Section 666. Section 201(b) prohibits giving or receiving anything of value with the intent to "influence" or of "being influenced." 18 U.S.C. § 201(b)(1)(A), (b)(2)(A). Section 666, by contrast, prohibits giving or receiving anything of value with the intent to "influence or reward" or "to be influenced or rewarded." *Id.* § 666(a)(2), (a)(1)(B). If the scope of these prohibitions is the same, then the word "reward" has no independent meaning in Section 666, which would seem to violate the requirement that we are to give effect to every word of a statute. *See Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011). I am not sure that this problem can be resolved by reading "reward" as clarifying how a bribe can be timed, as the majority does.

Third, Appendix A to the United States Sentencing Guidelines Manual provides that Section 2C1.2, the guideline covering gratuities, applies to both Section

666(a)(1)(B) and Section 666(a)(2). Although the Sentencing Commission cannot change the meaning of a statute, Congress does have the opportunity to review proposed guidelines before they become effective. 28 U.S.C. § 994(p).[28] Moreover, we have held that "*Chevron* deference is the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute." *United States v. LaBonte*, 70 F.3d 1396, 1404 (1st Cir. 1995), *rev'd on other grounds*, 520 U.S. 751 (1997).[29] While I do not suggest that *LaBonte*'s rule applies here, the Sentencing Commission's determination that the gratuity guideline applies to Section 666 does at least give me pause as to Congress's meaning.

In the end, I would apply the rule of lenity because it is ambiguous whether Section 666 criminalizes gratuities. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). We apply the rule of lenity "only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 65 (1995)

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[28] Like the majority, I am concerned with the disparity between the statutory maximum sentences for an illegal gratuity under Section 201 and for a violation of Section 666. But I would point out that an illegal gratuity carries a base offense level three levels lower than bribery does, U.S. Sentencing Guidelines Manual §§ 2C1.1(a), 2C1.2(a) (2012).

[29] When the Supreme Court decided *United States v. LaBonte*, the three dissenting justices stated that *Chevron* deference was appropriate, 520 U.S. at 777 (Breyer, J., dissenting), while the remaining justices chose not to decide the issue, *id.* at 762 n.6.

(citations omitted) (internal quotation marks omitted). Here, I can make no more than a guess as to what Congress intended Section 666 to mean. Therefore, I would hold that the defendants cannot be convicted for giving or receiving a gratuity.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed: 07/27/2015]

Nos. 14-1089 and 14-1091

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN BRAVO-FERNANDEZ and
HECTOR MARTÍNEZ-MALDONADO,

Defendants, Appellants.

Before

Howard, *Chief Judge*,
Torruella,* Lynch, Lipez, Thompson,
Kayatta and Barron,
Circuit Judges.

Entered: July 27, 2015

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the joint petition for rehearing en banc has also been treated as a joint petition for rehearing before

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* Judge Torruella is recused and did not participate in the consideration of this matter.

the original panel. The joint petition for rehearing having been denied by the panel of judges who decided the case, and the joint petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the joint petition for rehearing and joint petition for rehearing en banc be denied.

By the Court:
/s/ Margaret Carter, Clerk

cc:

Vijay Shanker
Nelson Jose Perez-Sosa
Peter M. Koski
Martin G. Weinberg
Kimberly Homan
David Zeltner Chesnoff
Joseph C. Laws
Jose Antonio Pagan-Nieves Jr.
Lisa Schiavo Blatt
Saraliene Smith-Durrett
Christian E. Pagan-Cordoliani
Maria L. Montanez-Concepcion
Juan A. Marques-Diaz
Luis Berrios-Amadeo
David C. Indiano-Vicic

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed: 08/06/2015]

No. 14-1089

UNITED STATES,

Appellee,

v.

JUAN BRAVO-FERNANDEZ,

Defendant-Appellant.

No. 14-1091

UNITED STATES,

Appellee,

v.

HECTOR MARTINEZ-MALDONADO,

Defendant-Appellant.

Entered: August 6, 2015

ORDER OF COURT

Upon consideration of the defendants-appellants' opposed joint motion to stay the mandate, the motion is granted. The issuance of the mandate is hereby stayed for 90 days and, if within that period a timely petition for writ of certiorari is filed, shall continue until final

disposition of such petition by the United States Supreme Court. Should any petition for writ certiorari be denied, mandate shall issue forthwith. Counsel for the defendants-appellants are directed to promptly notify the Clerk of this court both of the filing of any such petition for writ of certiorari and its disposition.

By the Court:
/s/ Margaret Carter, Clerk

cc:

Vijay Shanker
Nelson Jose Perez-Sosa
Peter M. Koski
Martin G. Weinberg
Kimberly Homan
David Zeltner Chesnoff
Joseph C. Laws
Jose Antonio Pagan-Nieves Jr.
Lisa Schiavo Blatt
Saraliene Smith-Durrett
Maria L. Montanez-Concepcion
Juan A. Marques-Diaz
Luis Berrios-Amadeo
David C. Indiano-Vicic
Christian E. Pagan-Cordoliani
Seth Allen Erbe
Sonia Ivette Torres-Pabon
Abbe David Lowell
Christopher Dowden Man